This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

J. J. Crentip

LIBRARY OF THE
LELAN[illegible]RSITY

MISSISSIPPI STATE CASES:

BEING CRIMINAL CASES DECIDED

IN

The High Court of Errors and Appeals,

AND IN THE

SUPREME COURT,

OF

THE STATE OF MISSISSIPPI;

From the June Term 1818 to the First Monday in January 1872, inclusive.

WITH

EXPLANATORY NOTES OF ENGLISH AND AMERICAN DECISIONS AND AUTHORITIES; AND A MANUAL OF FORMS FOR MAKING UP RECORDS, ENTRIES, CRIMINAL PLEADINGS, Etc.

BY J. S. MORRIS,

ATTORNEY GENERAL OF MISSISSIPPI.

IN TWO VOLUMES.

VOLUME II.

JACKSON, MISS.,

PUBLISHED BY THE COMPILER.

1872.

LIBRARY OF THE

LELAN[illegible]ASITY

Entered according to Act of Congress, in the year 1873, by
JOSHUA S. MORRIS,
In the Office of the Librarian of Congress at Washington, D. C.

03096

HOSFORD & SONS,
STATIONERS AND PRINTERS,
NEW YORK.

SEARGENT SMITH PRENTISS.

Mr. Prentiss, whose portrait adorns this volume, was born at Portland, Maine, September 30, 1808, and died at Natchez, Mississippi, July 1, 1850.

His father, William Prentiss, and his mother, whose maiden name was Mary Lewis, were both descended from pilgrim stock. Their son, of whom we speak, from the effects of a violent fever in his infancy, became an incurable cripple, a circumstance which induced in the minds of his parents and family a special solicitude in his behalf.

His education was commenced at Gorham Academy in his native State, under the tutorage of Rev. Reuben Nason, a ripe scholar and most exemplary gentleman. At the age of fifteen years he entered Bowdoin College, where he graduated and commenced the study of law. And though, throughout his boyhood, he had been delicate as a girl, and rendered apparently still more so by the infirmity we have named, he early ripened into a robust and lion-chested man, than whom the rugged hemlocks of his native shores were scarcely more hardy.

His parents were in comparatively moderate circumstances and he of ambitious and self-reliant character. At the age of nineteen years he left the endearments of home and turned his face toward the Southwest, resolved to seek fortune and fame among this generous and warm-hearted people.

In 1827 he arrived at Natchez, and was soon afterward employed as a private teacher in the family of the Hon. Judge Shields, then recently deceased. In this position he had the advantages of refined and Christian society, and the use of an excellent law and miscellaneous library. To these circumstances of his situation at this period of his life he always attributed much of his success in after years,

and he ever alluded to the noble woman who was thus his early benefactress in terms of the warmest esteem and gratitude.

In the winter of 1828-9 he abandoned the life of a schoolmaster, entered the law office of the celebrated Robert J. Walker at Natchez, and devoted all his energies to the study of law. In the June following, alone, on horseback, he made his way across the country about one hundred miles to Monticello, where the Supreme Court of the State was then in session, and there applied for and obtained an examination as to his qualifications and a license to practice law. Returning to Natchez, he was taken into partnership in practice with General Felix Huston, at that time one of the most distinguished lawyers of the State. And it was then immediately discovered that the few years he had devoted to legal study had been years of noble and splendid achievement. Twenty-one years afterward, when the grave had just closed over his honored remains, his friend and kindred spirit, Joseph J. Brennan, himself a lofty and dazzling genius, alluding to the advent of young Prentiss as an advocate, said: "A weak and debilitated boy, with gentle lisp, and supported by a sustaining cane, was soon seen stealing away the technical hearts of stern judges, or weaving seductive tales in the honest ears of sworn jurymen. Resistless as the penetrating breeze, his juvenile eloquence searched every avenue of thought and feeling. The classic page and the varied mass of modern literature were conveniently stored away in the massive caverns of his broad and fertile intellect. A close train of didactic reasoning on the most abstruse legal topics, was lit up with the pyrotechnic fires of fancy. The most ordinary incidents of life, the merest common-places, were caught on the wings of his imagination, and blended and effectively commingled in his illustrative oratory with the boldest and most gorgeous metaphors."

This was no exaggeration. It rather falls far short of the simple truth. Stepping almost immediately from the log school-house to the arena of the courts, the youthful adventurer, without money, without friends and without influence, forced even the Nestors of the bar to yield to him the highest place in the very front ranks of their noble profession. With him there were no intermediate stages of experience, so memorable in the lives of all other great advocates. He sprang, full armed, like the goddess from the head of Jove, into the conflict and, apparently without a struggle, to victory and the most splendid triumph of his profession.

From the hour of his *debut*, his fame as an orator, as a logician and

as a counselor of profound learning, spread far and wide, not only throughout the State but all over the Union. The memorable epoch of speculation, of inflated credit, of broken banks and of financial explosions was then near at hand in the new and exceedingly wealthy State of Mississippi. In every great contest at the bar Mr. Prentiss was the central, and generally the controlling intellect and the leading spirit. In the stormy period which followed he was, on every theatre of action and in every scene, an actor without an equal, and the object of universal admiration and applause. His energies never wearied; his vigilance never slept; his learning was without limit; his powers of invention were never at a loss; his memory retained with indelible fidelity all that he ever knew; his expedients for apparently hopeless cases never failed him; his liberality and generosity to friend and foe amazed every beholder; his courage never quailed, and his integrity or his honor was never blemished. In the extent of his civil and criminal practice, in his unexampled success, in the splendor of his pecuniary rewards, in his boundless influence over both the judgments and passions of men of either high or low position, he was above all others—without an equal and without a competitor.

His manner as an orator, even in his boyish efforts, was simple, unostentatious, artless and sincere. He first drew to himself and to his cause the interest and the sympathies of every heart, and then, by the most skillful and overwhelming argument, comparison, illustration and appeal, captivated and led away, obedient to his will, the consciences and understandings of all who heard him. His figures and metaphors were drawn from the grand and the beautiful in nature. The mountains, the ocean, the thunder-riven crag, the rainbow, the stars, the flowers, the birds, or the glorious sunset, became a thousand times more grand, or a thousand times more lovely, when called into service of his matchless eloquence.

But this was not all. The gorgeous splendor in which he was accustomed to deck the creations of his own wonderful imagination has sometimes led those who only saw and heard him as he careered amidst courts and popular assemblies to suppose that he was only a natural orator—more brilliant, indeed, than any other, but, after all, a mere declaimer. There could be no greater mistake. From his maiden attempt to his last, it is believed that no one of his contemporaries ever fathomed the depth of his solid erudition either in legal science or general literature, or found a flaw or defect in his perfect accuracy. Many persons of profound discrimination, and who knew him inti-

mately and observed him closely for twenty years, assert that he was never found deficient in a perfect knowledge of any principle, precedent, analogy or distinction which could in any manner affect the business before him. True, he dealt largely in his own resources—in invention, in refinements, in subtleties—but these always led him up, before he concluded, to the plain and well-beaten path of long revered and acknowledged authority; and that path grew brighter as he trod it. True, he did sometimes seem to dwell longer than is customary in the discussion of maxims or of elementary propositions; but it was because his mind grasped and comprehended these maxims and original principles not merely as such, but in their reason and their far-reaching consequences and never-ending kindred associations. Touched by the magic of his genius, the driest and most unattractive technicality arose and walked forth a thing of life, a miracle of beauty, and "a joy forever." His taste was delicate, correct and sensitive, to detect, appropriate and preserve everything beautiful and noble in nature, in life or in fancy. But his avidity for learning could not be sated. Indeed, it is not too much to say that even he could not have shone, with such transcendent splendor, above all his contemporaries at the bar in Mississippi, as it was then composed, without extraordinary merits as a jurist. To hold a hand among them, every contestant required not only a brilliant but an impenetrable armor. It has been said of a celebrated English statesman that he wielded the club of Hercules, wreathed in the most beautiful roses. It is believed that this simile would apply more truthfully to Mr. Prentiss than to any man of his time.

In the summer of 1837, President Van Buren convoked a special session of Congress. The terms of the representatives of Mississippi having expired with the close of the regular session on the 3rd of March preceding, Governor Lynch issued writs of election to fill the "vacancy." The election was held in July, and Messrs. S. J. Gholson and J. F. H. Claiborne were elected. At the "regular election" in November following Mr. Prentiss and Mr. T. J. Word were elected to the Twenty-fifth Congress. Mississippi was decidedly Democratic, but the genius and eloquence of Prentiss, then only twenty-nine years old, swept down all opposition, and he and his colleague on the Whig ticket were elected. At the opening of the Session of the following December, the Democrats claimed that the election of Messrs. Gholson and Claiborne to the special session in July, should hold good for the succeeding full term. Without any delegation from Mississippi,

the two parties were equally divided, and the Speaker, Mr. Polk, being a Democrat, his casting vote would turn the scale for his party. It is foreign to the present purpose to speak of the merits of the question involved in the contest which followed. Suffice it to say, that it was decided solely upon party grounds; and Mr. Prentiss and his colleague were rejected. He was the champion of his own—or rather, to adopt his idea at the time—of the State's cause. The halls of Congress have never resounded to purer or loftier eloquence. It was in the closing paragraph of his peroration on this occasion that he said:

"You sit here, twenty-five sovereign States, in judgment upon the most sacred right of a sister State—her right to representation; that which is to a State what chastity is to a woman or honor to a man. Should you decide against her you tear from her brow the richest jewel that sparkles there, and bow her head in shame and dishonor. But if your determination is taken; if the blow must fall; if the violated constitution must bleed; I have but one request to make. When you decide that she shall not herself choose her own representatives, then blot from the spangled banner of the Union the star that glitters to the name of Mississippi, but let the *stripe* remain as a fit emblem of her degradation!"

But though the young orator was unable immediately to obtain the seats for himself and colleague, Congress was unable wholly to resist his fascinating and impetuous eloquence. The whole question was referred back to the people of Mississippi at the polls. The triumphant re-election of the Whig candidates, and the unparalleled splendor of Mr. Prentiss' brief career of two years in Congress; especially his masterly exposure of "the defaulters" under Mr. Van Buren's administration; his disgust with, and voluntary abandonment of political life; his devotion to the Federal Union; his opposition to Mississippi Democracy, and especially to "repudiation;" his increasing fame as a lawyer; his marriage to Miss Williams, of Natchez; his residence at Vicksburg; his removal to New Orleans; his errors, his misfortunes, and his early death, are all well known. Indeed, so illustrious were his intellect, his character and his achievements, that nothing that relates to him can be foreign to the history of the State or of the times in which he lived.

In social and domestic life, Mr. Prentiss was the soul of gentleness, of poetry, of wit and of refinement. His repartee always sparkled but never stung. His habits were convivial, but never sensual. * * *

Guardful always of his own honor, and that of his friends, he was instant and terrible as a thunderbolt in his resentment of intentional injury; but he bore no malignity, and cherished no enmity against even those who had slighted or injured him.

The mists of a quarter of a century and more have settled over the most memorable of his intellectual achievements, and, such was his strange indifference to posthumous fame, only a very few, and they, very imperfect, sketches of any of them remain. He never wrote for print, and to have reported one of his speeches would have baffled the best phonographic skill. The simple Saxon words he loved so well, when borne upon the wings of his seraphic voice, were as tameless as the meteor's flash, or an eagle careering in the upper air; even the atmosphere in which he stood was mesmeric of his genius. His elocution, when he spoke of love, of beauty or of truth, was soft as the zephyr's whisper to Æolean chords; but it fell with the tempest's wrath in invective upon treachery, upon meanness or upon crime.

Of the friends whose plaudits quickened the pulsations of his noble ambition, many are gone. Some of them were swallowed up in the wave of that civil war which was seen by his prophetic eye long years before. The rest are being rapidly swept away, like ripened acorns before the autumn blast. The muse of history may forget or neglect their names and his; but his eloquence shall long live in the ear and heart of Mississippi, like the dimly remembered music of childhood, or the voice of a sister we have lost. He sleeps in the land of the magnolia and the mocking-bird; and yet the spot has no enduring mark, save that noble River, whose current, in its depths, its restlessness and grandeur so much resembles his spirit and his genius.

SAM v. STATE, 33 Miss. Rep., 347.

ARSON.

The confessions of a slave made to his master are not privileged communications, and are properly admissible in evidence against him, if made freely and voluntarily, and without any undue influence being exerted to obtain them.

The master, after the arrest of the slave, chained him; and whilst they were together alone, he asked the slave why he had burned the gin-house—assuming, in the form in which he put the question, that the slave was guilty, but used no force to extort the confession; whereupon the slave confessed the burning, and said he had committed the crime because he wished to be hung. *Held:* That the means used to obtain the confession were not improper, and the confession was properly admitted as evidence.

The *corpus delicti* in a case of arson is the burning of the house; and if that fact be established by evidence *aliunde*, the confessions of the accused are admissible to show that the burning was done feloniously, and that he was the criminal agent.

Error to Holmes circuit court. HENRY, J.

J. M. Dyer, for plaintiff in error.

1. The circuit court erred in admitting the confessions of the prisoner to John A. Durden, his master, that he burnt the gin, to go to the jury. For a master cannot give evidence of the confessions of his slave to him, because, from the relations existing between them, the slave is always presumed to be under the influence and coercion of the master. State v. Charity, 2 Dev., 543; Wheeler on Slavery, 214.

2. The *corpus delicti*, or felonious burning of the gin, was not proven by any other evidence than the confessions of the slave to the master, which, if admissible, were utterly insufficient to establish the fact of the felonious burning. In the United States the prisoner's confession, when the *corpus delicti* is not proved, has been held insufficient for his conviction. 1 Greenl. Ev., 325, § 217; Guild's case, 5 Halst., 163, 185; Long's case, 1 Hayw., 524; 4 Hawk. P. C., 425, book 2, ch. 46, § 36.

The *corpus delicti* in a case of arson does not simply consist in the fact of the burning, for that may have been done by accident, and, therefore, no crime; but it means the felonious or criminal burning of it; and that felonious or criminal burning must be proved otherwise than by the prisoner's confessions. The body of the offense or crime must be established by independent testimony other than the confessions; and the latter

serve, on account of the little weight attached to them, merely to point out the person who did the deed. *Vide* authorities above cited.

D. C. Glenn, attorney general.

HANDY, J.:

The plaintiff in error was indicted and convicted in the court below of burning a gin and cotton-house, contrary to the statute; and the case is brought here for review upon two grounds of error.

1st. The master of the slave was offered as a witness in behalf of the state, and for the purpose of proving confessions by the prisoner of his guilt. The witness testified that the prisoner was taken up about sixty miles from the place where the burning took place, and two or three days thereafter. That when the witness got possession of him, he chained his legs together, and brought him home in the stage-coach along with him. That witness then asked him why he burned the gin-house, and he replied that he did so because he wished to be hung; and that witness assumed, in the questions he asked him, that he had burnt the gin-house, but that no force was used to extort the confessions, and that the witness knew nothing of his own knowledge as to how the gin-house was burned, though he knew the fact that it was burned. The prisoner objected to the admission of the statements of the prisoner to his master; but the objection was overruled and exception taken; and this is the first ground of error relied on.

It is contended that it is not competent to give evidence of the confessions of a slave made to his master, because he is under the constraint of the master; and the confessions cannot be considered as being made freely and voluntarily, and without some degree of influence arising from the presence of the master, and obedience to his wishes.

The relation which the slave bears to the master is certainly one of dependence and obedience; but it is not necessarily one of constraint and duress. It is not to be presumed that the master exercises an undue influence over his slave to induce him to make confessions tending to convict him of a capital

offense; because, besides the feelings of justice and humanity which would forbid such efforts, it would be against the interest of the master that the slave should make confessions which would forfeit his life; for he would thereby sustain a loss to the amount of one-half of the value of the slave. Nor is it to be presumed that the slave will make confessions to his master tending to convict him of a crime for which he would suffer death, with a view of yielding to the wishes of the master, and when he was aware of the consequences of the commission of the crime; for that would be in opposition to all the promptings of self-preservation—the most powerful of all motives. It is rather to be presumed that he would deny his guilt, relying on the protection of the master, in the absence of inculpatory evidence. For the hope of protection from the master, in consequence of the denial, is a much more natural and reasonable motive, and far more just to the humane feelings of the master, than that of self-sacrifice to the master's cruelty. And the force of this motive is illustrated by the humane conduct which constant experience shows to be exhibited by masters, in the just and reasonable defence of their slaves when charged with the commission of crimes.

Although such confessions should be received with great caution, and excluded where there is anything tending to show that they were induced by fear, or by hopes of favor, or by undue influence of any description, we do not consider them inadmissible where there are no such circumstances shown; and we can perceive no danger in submitting them to be weighed by the jury. Such confessions are not incompetent upon any sound legal principle; and to establish the rule that they are incompetent, would be highly impolitic and dangerous; because, from the nature of the connection between master and slave, if confessions fully made to him should not be admissible, they would not be likely to be made to any others; and thus, however true the confessions, and however strongly corroborated by circumstances, all violations of law committed by slaves the proof of which depended on that sort of evidence, would go unpunished in the courts of justice. And the consequence of this would be, that a disposition would be created to punish slaves otherwise

than according to the rules and restraints of the law, which should operate both in its protection and in its punishments upon them as well as upon the white man.

We, therefore, think that this objection was properly overruled.

2d. It is objected that, as there was no evidence of the felonious burning besides the confessions of the prisoner, his confessions alone were not sufficient to support the indictment, upon the established principle that where the *corpus delicti* is not otherwise proved, the prisoner's confession is not sufficient to warrant his conviction; and it is said that the *corpus delicti* consists in the felonious burning of the gin-house.

The main fact necessary to be established as the basis of the prosecution was, that the house had been burned; for, without that, there could be no guilt in any one. After proof of that fact, it was necessary to prove how it was done, and by whom; and these particulars could be established by any evidence which was competent in law, and sufficient in its force to satisfy the mind. The rule with regard to proof of the *corpus delicti*, apart from the mere confessions of the accused, proceeds upon the reason that the general fact, without which there could be no guilt, either in the accused or in any one else, must be established before any one could be convicted of the perpetration of the alleged criminal act which caused it; as in cases of homicide, the death must be shown; in larceny, it must be proved that the goods were lost by the owner; and in arson, that the house had been burned; for otherwise the accused might be convicted of murder, when the person alleged to be murdered was alive; or of larceny, when the owner had not lost the goods; or of arson, when the house was not burned. But when the general fact is proved, the foundation is laid, and it is competent to show, by any legal and sufficient evidence, how and by whom the act was committed, and that it was done criminally.

Here the burning was proved apart from the prisoner's confessions; and the confessions were, therefore, properly admitted in evidence.

We think that there is no error in the record, and consequently the judgment must be affirmed.

SHARKEY v. STATE, 33 Miss. R., 353.

GAMING.

Betting money in this state is indictable, no matter if the subject-matter of the bet might not be within the state.

Error to Attala circuit court. HENRY, J.

M. C. Sharkey was indicted in the circuit court of Attala, for betting with one Matthews on the result of the election for electors for President and Vice-President of the United States, held in the state of Kentucky, in November, 1856.

The defendant demurred to the indictment, and his demurrer being overruled, he excepted, and sued out this writ of error.

J. A. P. Campbell, for plaintiff in error.

It is not a violation of the statute to bet on the result of an election to be held in another state. The act was intended to embrace all elections which may be held in this state. Hutch. Code, 951.

In Delaware, it has been held to be no violation of her statute against gaming, to bet there on a horse-race to take place outside of Delaware. 4 Harr. 308.

Alabama has a statute similar to ours, and her supreme court has decided, that it was not a violation of her law to bet there on an election which has been consummated, though the result is unknown at the time of the bet. 2 Ala. 340.

D. C. Glenn, attorney general, argued the case orally.

HANDY, J.:

This was an indictment for betting money in this state upon the result of the last Presidential election, held in the state of Kentucky.

The objection to the indictment is, that the offense charged is not within the mischief intended to be prohibited by the statute upon which it is founded; that the statute intended to suppress the practice of betting upon elections to be held in this state, the tendency of which was to produce undue excite-

ment amongst our citizens, and improper interference with the elective franchise.

But this, though it may have been an evil intended to be prevented, is manifestly not the primary object of the statute. The statute was passed "to discourage and suppress gaming," and its provisions are directed against gaming, or wagering, or betting money, in various forms, and amongst others, "upon the result of any election, of any kind whatever." It is, therefore, the *betting money* in this state which was intended to be punished, though the subject-matter of the bet might not be within the limits of the state.

Upon this view, the judgment of the court below sustained the indictment; and it must be affirmed.

MILLER v. STATE, 33 Miss. R., 356.

GAMING.

Under the laws of this state, betting on the unknown result of an election which has already been held, is an indictable offense.

It is not necessary, as a general rule, to prove the offense to have been committed on the very day named in the indictment. But whenever time is of the essence of the offence, or a necessary part of the description of it, the time must be proved as laid.

Time is not essential or descriptive of the offense of betting on an election.

Objection to an illegal grand jury may be made by motion in arrest of judgment.[1]

In error from the circuit court of Attala county. Hon. E. G. HENRY, J.

J. A. P. Campbell, for plaintiff in error.

The record of this case presents two questions. First, upon the bill of exceptions; and second, upon the motion in arrest of judgment.

In the court below defendant was on trial, under an indictment for gaming, which charged that on the 28th day of

[1] This provision has been modified by statute (Revised Code of 1857, p. 449, art. 131), which makes the empanelling of a grand jury conclusive evidence of competency and qualification; but permits exception to the array for fraud.

October, A. D. 1856, he made a bet on the Presidential election, to be held on the 4th of November, and the proof was, that the defendant, on the 6th day of November, A. D. 1856, after the election mentioned in the indictment had been held, made the bet mentioned. Upon this state of facts, defendant asked the court to charge the jury, that if the bet was made after the election had been held, and not upon an election to be held, they should acquit the defendant. This instruction was refused, and the jury instructed to find defendant guilty, if the bet was made either before or after the election. This action of the court is the first error assigned.

It is true as a general rule, that time is not necessary to be proved precisely as laid in the indictment, but it is equally true as a universal rule that, whenever time is of the essence of the offense, or is descriptive of it, it must be proved, if not precisely as laid, at least so far as may be necessary to describe the offense. 2 Russel on Crimes, 802; Wharton's Cr. Law, 220.

In the first place, I assume that it was not a violation of our statute against gaming to bet on an election after it has been held; and in support of this position, refer the court to the case of The State v. Mahare and Henry, 2 Ala., 340, where this point has been decided in accordance with this view.

In the next place, if it be an indictable offense to bet on the unknown result of an election which has been held, I assume that the party indicted must be charged with this offense, otherwise he cannot be convicted of it. There is an obvious difference between betting on an election to be held, and betting on one which has been held. The same difference which exists between the future and the past. The *allegata* and *probata* must correspond, else how can a defendant prepare his defense, or protect himself against a second prosecution for the same offense?

The next error assigned is the action of the court below in overruling defendant's motion in arrest of judgment, and to quash the indictment.

This motion was based on the fact, shown by the record of the organization of the court, at which the indictment in this

case was found and presented this indictment, was composed of nineteen men.

I contend that a grand jury composed of nineteen men is an illegal and unauthorized body, and that all their acts are void.

It seems to be well settled, that if one of a grand jury be an incompetent and illegal member, that vitiates the whole panel, and for the obvious reason, that twelve must concur to find a bill; and for all that can be known the illegal member may be the very one without whom the requisite number to find a bill could not be procured. Barney v. State, 12 S. & M., 68. Until 1854, a grand jury could not consist of a greater number than eighteen men. Hutch. Code, 887.

The law of 1854, Session Acts, p. 468, and of 1856, Session Acts, 26, provide that twenty men be summoned to serve as grand jurors. The second section provides that they be empaneled, sworn, and charged as before, "and in case a sufficient number to constitute a grand jury shall not attend," etc. This suggests the question, what is a sufficient number to constitute a grand jury? And as the law itself does not furnish an answer, we are compelled to resort to the old law, Hutch. Code, 887, to ascertain the number, as well as how they are to be "empaneled, sworn, and charged." It will be observed that the act of 1854 does not repeal the old law generally, but only in so far as it expressly enacts in opposition to it, and of course it will be held that the old law is repealed by the new only in so far as it expressly provides a rule different from the old. It will doubtless be replied, that the object of the law was to have summoned twenty men, any number of whom over twelve might compose a grand jury? To which I rejoin, that if such was the object, it might easily have been expressed in framing the law, and if such was the object it was not manifested by the language of the law. The act of 1854 does not say that the twenty men summoned shall compose the grand jury, but says, they shall be "summoned to serve," etc. If the twenty summoned are to compose the grand jury, it follows that a less number than twenty cannot be empaneled, sworn, and charged, because a second section provides, that if a suffi-

cient number to constitute a grand jury shall not attend, or in case any be excused by the court, others are to be at once summoned to fill their places. It seems to me to be plain, that a grand jury composed of more than eighteen men, is not authorized by law, or else a less number than twenty men cannot be empaneled as a grand jury. One or the other of these propositions must be admitted. For I do not think that authority can be found in the act of 1854 for the court to empanel any number it may see fit less than twenty, and more than twelve. The act itself does not say this, nor anything like it, and it would be interpolation to construe it to mean this. If I am correct in any of the propositions for which I contend, the judgment of the court below in this case must be reversed.

D. C. Glenn, attorney general.

SMITH, C. J.:

This was a conviction, in the circuit court of Attala, for betting on an election. The indictment under which the defendant was tried, charged that said defendant, "on the 28th day of October, 1856, bet a fifty-dollar bank note against a horse, with one M. C. Sharkey, upon the result of a certain election, to be held on the 4th day of November, A. D. 1856, in the state of Kentucky, for "Presidential electors," etc. On the trial, it was proved that the bet was made on the 5th or 6th day of November, 1856, and, of course, after the Presidential election had been held in the state of Kentucky. Upon this evidence, under the instructions of the court, the defendant was found guilty and sentenced. Whereupon he prosecuted this writ of error.

On the trial, at the instance of the prosecuting attorney, the court charged, amongst other instructions given to the jury, that "if they believed, from the evidence, the bet was made, either before or after the election mentioned in the indictment, within twelve months next before the finding of the indictment, the indictment will be sustained." And the court refused the instructions requested by the defendant, which were in the words following, to wit:

"If the jury believe, from the evidence, that the bet was

made after the election was held, and after the time laid in the indictment, they should find the defendant not guilty."

"If they believe the bet was made after the time laid in the indictment, they will acquit."

And "if they believe the bet was made after the election had been held, they will acquit."

The last instruction raises the question, whether a bet made upon the result of an election, after the election was held, is a violation of the statute under which the indictment was framed; and which applies to all persons who "shall wager or bet, or who shall promote or encourage the wagering or betting of any money, or other valuable thing, upon any cock-fight or duel, or upon the result of any election, of any kind soever."

This language is certainly broad, and is sufficiently comprehensive to include any wager or bet upon the uncertain result of any election, whether made before, or subsequent to, the time of holding such election. The evils resulting to the commonwealth may be, and doubtless are, greater from the practice of betting upon future elections, than which would result from the same practice if confined to elections which had previously taken place. But, for that reason alone, we are not authorized to restrict the plain and express language of the statute to the practice of betting on elections to be held after the bets were made. And that, too, in the face of the manifest object of the legislature, which was to suppress entirely the evil practice of gaming of all kinds. In our opinion, therefore, the court was correct in refusing the instructions.

Generally, it is not incumbent upon the prosecution to prove that the offense charged was committed on the precise day alleged in the indictment. It is sufficient, as a general rule, that the offense charged be proved to have been committed before the finding of the indictment. But there are some exceptions to this rule. And it is laid down, that whenever time is of the essence of the offense, or a necessary ingredient in the description of it, the time must be proved as laid in the indictment, at least so far as may be necessary to identify the offense charged. Wharton's Crim. Law, 220; 2 Russ. on Crimes, 802;

Archbold's Cr. Plead., 90. And counsel insist that the present case comes within this exception to the rule.

A bet on the result of a future election, it is argued, is materially different from a bet on the result of an election which has been held. And hence, that the time stated in the indictment is an essential part of the description, so as to distinguish the one from the other.

This argument proceeds upon the assumption that the statute has created two distinct offenses, one of which is committed when a bet is made on the result of an election to be held after the bet is made; and the other, when a party bets upon the unknown result of an election previously. In our opinion, the statute draws no such distinction. It has created but a single offense, which is consummated where a party bets on the result of an election, either before or after it has been held. Upon this construction of the necessary ingredient in the description of it. And it follows, hence, that the words "to be," inserted in the indictment before the words "held on the 4th day," etc., which designate the election as a future event, were mere surplusage, and might have been stricken out without affecting the charge, or disregarding in the proof. In our opinion, therefore, there was no error in granting or refusing the instructions requested by either party.

It appears from the record, that nineteen persons, by order of the court, were empaneled and sworn as grand jurors for the term at which the indictment was found. This is made the ground of another exception in this court. The objection was made in the court below by motion in arrest of judgment.

Under the law as it existed prior to the adoption of the act approved March 1st, 1854, and of the act of the 20th of February, 1856, which extended the provisions of the former to all of the counties in the state, the circuit judge, at his discretion, might select any number of the venire in attendance on court, not under nor over eighteen, to be drawn by lot to serve as grand jurors.

We do not doubt, if the former law be still in force, that a grand jury composed of less than thirteen grand jurors, or more than eighteen, would be illegal, and its acts void. It hence be-

comes necessary to determine whether that law, in respect to the number of which a grand jury should be composed, has, by the acts above referred to, been altered or repealed.

The act of 1854, local in its operation, but made general by that of 1856, is silent as to the number of the grand jury. And it does not in express terms repeal the provisions of the sixth section of the statute of 1830, which declares that the grand jury shall be constituted on not less than thirteen nor more than eighteen persons. It seems, therefore, justly inferable, that the legislature, in requiring the sheriff to summon twenty men to serve as grand jurors, did not thereby intend to designate the number of which the grand jury should be composed, but only to provide a body of men out of whom a grand jury should be selected. Indeed the act itself leaves this a matter of inference. The second section of the act directs that the grand jurors thus summoned should be empaneled, sworn, and charged in the manner then prescribed by law. Another consideration renders this construction still more probable. It is evident upon an examination of the language employed in the same section, that the legislature proceeded upon the supposition that the number of the grand jury was prescribed in the act itself, or by some antecedent law, which it was not its intention to repeal. It directs, that in case a sufficient number shall not be in attendance to constitute a grand jury, it shall be lawful immediately to summon others. This language appears to indicate, and very clearly too, the whole number (twenty) directed to be summoned should not be requisite to the due constitution of the grand jury. For if the legislature, by providing that twenty men should be selected and summoned by the sheriff, intended to fix the number of the grand jury at twenty, it would have directed that if any of the twenty summoned should fail to attend, that others to supply their places should be summoned. And this construction of the statute was applied in the case of Weeks v. State, 31 Miss. R., 490.

The statute, as above remarked, is silent in reference to the number of the grand jury. It results, therefore, from the decisions in Weeks' case, that if the act of 1830 in this respect be repealed, the legislature intended to leave it to the discretion

of the judge to order any number of persons, not exceeding twenty, to be empaneled and sworn as a grand jury. It is unnecessary to say that this construction is not to be tolerated. Upon every view which we can take of the subject, it is our opinion that, in the act under consideration, the legislature did not intend to interfere with the pre-existing law, which designated the number of which the grand jury should be composed.

The result of this conclusion is, that the grand jury who found the indictment in this case were illegally constituted. And hence, that the judgment should have been arrested, on the motion of the plaintiff in error.

JOHNSON v. STATE, 33 Miss. R., p. 363.

GRAND JURY.

The provision of the statute that grand jurors shall be summoned "at least five days" before court, is merely directory, and for the convenience of the persons summoned, who, if not allowed the five days' notice, might not be obliged to attend; but the observance of this provision is certainly not necessary to the legality of the grand jury.

In error from the circuit court of Tippah county. SCRUGGS, J.

John F. Cushman, for plaintiff in error,

Cited, pamphlet Acts of 1854, p. 468; Hutch. Dig., p. 887, § 5; McQuillen v. State, 8 S. and M., 587; Rawle v. State, 24 Miss. R., 621.

T. J. Wharton, attorney general,

Cited, Weeks v. State, 31 Miss. R., 490.

HANDY, J.

This was an indictment in the Circuit Court of Tippah county for selling liquors without license, and in violation of law. The defendant pleaded, in abatement, that one of the members of the grand jury which found the indictment was not summoned at least five days before the first day of the term at which the indictment was found; and that said grand jury was not sum-

moned and empaneled to supply the place of any one of the grand jurors who had been summoned, and had failed to attend, etc.

To this plea a general demurrer was filed in behalf of the state, which was overruled, whereupon the court allowed the state to file a replication traversing the plea; and upon the trial the verdict was for the state.

It is now insisted that the judgment should be reversed on two grounds. 1st. Because, upon the demurrer to the plea overruled, the defendant was entitled to judgment upon the plea; and, 2d, because upon the trial the court excluded from the jury the testimony offered, to show that the juror in question had not been summoned five days before the first day of the term at which the indictment was filed, the testimony offered tending to contradict the sheriff's return as to the summoning of the juror.

Upon the first point, it appears that after the judgment upon the demurrer, no motion was made for a judgment of discharge of the defendant, nor was any objection taken to the filing of the replication; but the defendant took issue upon it, and went to trial. If this would not be a waiver of his right upon the demurrer, it would be a good reason why he should not have judgment here upon the demurrer, if it was manifestly well taken, and should have been sustained.

We think it clear that the plea was insufficient, and that the demurrer should have been sustained. The provision of the statute requiring that grand jurors should "be summoned at least five days before the first day of the court" to which they may be summoned, is manifestly merely directory to the sheriff, and for the convenience of jurors, that they may have sufficient notice of the service required of them. And though it might be true that a juror could not be compelled to attend unless so summoned, yet if he thinks proper to attend and serve without such notice, it constitutes no objection to the regular organization of the grand jury. The time of summoning the jurors, except so far as their own convenience is concerned, is quite an immaterial thing, which could in no wise affect their official acts.

This view of the case disposes of the second objection, and renders the evidence offered by the defendant immaterial.

Let the judgment be affirmed.

NED and TAYLOR v. STATE, 33 Miss. R., p. 364.

HOMICIDE.

If no objection be made in the court below to the examination of a witness, and if no motion be made to exclude his testimony from the jury, it will be too late to object to his competency in this court for the first time.

The principal witness against the accused, and whose testimony was necessary to their conviction, was a slave. The accused were also slaves, and were charged with the murder of another slave; all belonging to the same master. The witness, on the second day after the killing, was charged by his master with a knowledge of it; which he denied. He was afterwards tied, and stricken one blow by his master; and he and the other slaves were, at the same time, informed by the master that he intended to ascertain who did the killing, and that whoever was guilty should be hung. The witness thereupon stated that he was an eye-witness to the killing, and that the accused committed the deed, and that they had threatened to kill him if he ever divulged it; and he also, at the same time, gave a minute account of the transaction. Four months thereafter he was examined on the trial, making, in substance, the same statement. He was corroborated, in some respects, by other witnesses; and he differed from some others as to the time of the day at which certain facts, having a material connection with the question of the guilt or innocence of the accused, transpired. *Held:* That he was a competent witness, and that his credibility was a matter peculiarly in the province of the jury, and that their verdict convicting the accused of the homicide, as well warranted by his testimony.

If the verdict be rendered under such circumstances that its purity might have been affected, it will be set aside. But if it could not have been affected, it will be sustained. Where, therefore, one of the jury, pending the trial, being at the window of the court-room, called to a person in the street, and asked him to request his (the juror's) wife to send him his supper, to which the person thus addressed replied that "he would;" and the supper was sent as requested, and the persons who brought it came into the room where the jury were confined, but were not permitted to deliver it to the juror, the officer in charge of the jury received it from their hands, and delivered it to the jury. The officer also kept the persons who brought the supper on the opposite side of the room, sixty feet from the jury, whilst the supper was being eaten. The officer also testified that nothing passed between the juror and the person addressed by him in the street except what is above stated; and that, to his knowledge, the jury conversed with no one. It was held, that there was no improper tampering with or sinister influence brought to bear on the jury, and no cause for setting aside the verdict.

The state may, in a criminal case, examine a witness whose name is not marked on the indictment, and who has never been summoned to testify.

In error from the circuit court of Yazoo county. HENRY, J.

The plaintiffs in error were indicted in the court below for the murder of Ely, a slave. Upon the trial, W. M. Pickett, for

the state, testified that he was owner of the defendants, Ned and Taylor, and also of Ely, the deceased. That on Sunday night, —— July, 1856, being informed that Ely, who was his driver, was missing, and suspecting that some casualty had befallen him, he caused a lake to be dragged, which was distant about one and a half miles from his negro quarter; that Ely had a fish-trap in this lake, and was in the habit of visiting it on Sundays. That this search was fruitless, and on Tuesday following he rode down to the lake, and discovered Ely's body floating on the water. After the body was removed, he noticed that the skull was fractured. Witness then made a search, for the purpose of ascertaining who had committed the murder. He found a pair of pantaloons in one of the negro cabins, which Ned, one of the accused, acknowledged were his; on them were spots of blood.

A. F. Carson, for the state, testified that Ely was on the plantation on the Sunday before referred to; was in good health, but was missing on Sunday night. He examined Ely's body after it was found. His head was fractured and broken, as if struck by an axe; the mouth was mutilated, as if it had been bitten by fish. Witness thought the wounds might have been made by a hatchet, but not by a snag.

Sam, a slave, a boy about fifteen years old, and belonging to William M. Pickett, testified for the state that, on Sunday before referred to, he (witness), Ely, and another negro man named Charles, started about one hour by sun to the lake. After going some distance, Charles left them, saying he was going home. Witness and Ely went to the lake together, and remained there about half an hour fixing the fish-trap. They then started home, and about one-quarter of a mile from the lake, just as they passed by a large tree, he heard the report of a pistol. Witness and Ely both looked back, and saw Taylor (one of the accused) coming from behind the tree with a blue-colored double-barreled pistol. Taylor laughed and said he had scared Ely; to which Ely replied, "No, he hadn't." Taylor then bantered Ely to wrestle with him; Ely declined, when Taylor gathered him around the body and threw him down. After wrestling some time, Ely called to witness to get some

switches and whip Taylor, which witness did not do; but, at the request of Ely, he caught hold of Taylor's legs to pull him off, when Taylor cursed him and kicked him in the stomach. Ely then caught hold of a bush and pulled himself up. The parties continued wrestling until they got some distance down the hill, near a tree, when Taylor threw Ely on his face and cried out, "Come on, boys; I've got him." Ned then ran up with an axe in his hands, but before reaching the place where they were, Ely cried to Ned not to kill him with that axe. Ned made no reply, but struck Ely with the sharp edge of the axe across the upper lip, holding the axe in both his hands, and striking seemingly with great force. The axe penetrated to the teeth, severing but not cutting the lip entirely off. Witness did not think any teeth were knocked out. After striking the first blow, Ned reversed the axe and struck him on the back part of the head with the eye of the axe, which broke his skull. The deceased bled profusely, and the accused covered up the blood with leaves. The fight occupied about fifteen minutes. The accused then consulted for some time as to what they should do with the body, and concluded to throw it into the lake. Ned took the head and shoulders of the deceased, and Taylor the feet. Blood was still dripping from the head of the deceased, which hung rather over the shoulders and on the breast of Ned. In that position they carried deceased to the lake, when they laid the dead body on a log, after stripping off all the clothes except a shirt. They went down the lake after a canoe, and after placing the deceased in it, rowed down the lake some distance, then cast the body out in the water; after which they washed the blood from the canoe and log. The accused said they would bury the clothes, to prevent detection, and told witness that if he ever looked as if he knew anything about it, they would kill him. They went back to the place where Ely was killed, and covered up the blood with the leaves. Witness did not inform on the accused until the following Tuesday. His master told him he knew about this matter, and struck him one "lick" to compel him to divulge it; but he denied all knowledge on the subject; but afterwards his master tied him, and he confessed all. Witness was sure that the sun was not

more than one hour high when he and Ely left the negro quarter. Ely had at that time a hatchet in his hand.

Bob, a slave, for the state, testified that he was at Pickett's on the Sunday alluded to; that he saw Ned, one of the accused, leave the quarter with Ely, about two or three hours by sun; that he remained there until the sun was about an hour high, and saw nothing more of Ned or Ely.

The state here closed.

Mary, a slave, for the defense, testified that on the Sunday that Ely was killed, Ned came to her cabin and borrowed a coat; this was just before sundown.

Washington, a slave, for the defense, testified that he saw Ned about an hour before sundown on the Sunday Ely was killed; he was at the well at Pickett's quarter; had on a coat; his appearance was natural; and witness saw no unusual excitement about him.

Annie, a slave, for the defense, testified that she is a sister of Taylor; that her cabin is near the house of the overseer of Pickett; that on the Sunday Ely was killed she observed Taylor, one and a half or two hours by sun, scraping an axe-handle; he was so engaged until about an hour by sun, when the horn blew for the ploughmen to go to the lot and feed their horses; that Taylor went to the lot, and after feeding, returned to her cabin, and remained there until called up late at night to search for Ely. She knew that Taylor went to the lot to feed, for if he had not gone he would have been whipped, and he had not been whipped. Witness' cabin is about one hundred and fifty yards from the lot.

Jordan and Tom, slaves, stated they saw Ned, on the Sunday above referred to, just before sundown; and Suky, a slave, saw him about two hours by sun.

William M. Pickett, for the defense, testified that he had never whipped the witness, Sam, that he remembered of, but may have struck him one "lick;" that he told his negroes that some of them had killed Ely; and that he (witness) would find out who did it; and whoever did it should be hung. Having heard that Sam was last seen with Ely, he took him up, and

told him he knew who killed Ely, and that he must tell. Sam at first denied it; but witness afterwards tied him, and told him to say who killed Ely. Sam never varied materially in the statements he made concerning the matter; they were the same in substance as he had related from the witness-stand. Witness and Mr. Herrett were carried by Sam to the spot where he said Ely was killed, and after removing some leaves or brush, they found something which looked like blood.

Perry C. Dixon, for the defense, testified that several years ago he had overseen a plantation on which the accused were, and that they were both well behaved, obedient, and humane negroes.

The state, in rebuttal, introduced A. F. Cason, who stated that he was overseer for Pickett, and that the regular feeding-time on Sunday evening was about sundown; that he never whipped Sam about the killing of Ely, nor did he know that his master had.

Dick, a slave, for the state, testified that he saw Ned on the Sunday evening of the killing about sundown; that he had an axe on his shoulder; his pantaloons were wet, but witness saw no signs of blood on them.

The state also made formal proof of the venue. At the time Cason was offered as a witness for the state, the prisoner objected to his being sworn, because his name did not appear to be marked on the indictment as a witness, nor had he been summoned to testify in the cause. This objection was overruled, and the witness was sworn and permitted to testify, as above stated.

The jury convicted the prisoners of murder. They made a motion for a new trial, for the reason stated in the opinion of the court. On the trial of this motion, certain witnesses were introduced, and testified as set out in the opinion of the court. The motion being overruled, and the sentence of death pronounced on the prisoners, they sued out this writ of error.

R. Bowman, for plaintiff in error,

Filed an elaborate brief, reviewing the evidence, and insisting that it was insufficient to sustain the verdict of conviction. On

the point that a new trial should be granted, on account of the juror Holmes, he cited Boles v. State, 13 S. & M., 400; Hare v. State, 4 How. Miss., 187; McCann v. State, 9 S. & M., 466.

T. J. Wharton, attorney general.

On the point made, that the conduct of the juror Holmes was irregular, and vitiated the verdict, cited Boles v. State, 13 S. & M., 400; Nelms' case, ib., 500; 5 Miss. R., 25; 11 Leigh's R., 633, 714; 10 Yerg. R., 529; 4 Humph., 27; 5 Ire., 58; 12 Pick., 496; 3 Bibb, 8.

Q. D. Gibbs and *George B. Wilkinson*, on same side, filed an elaborate brief.

SMITH, C. J.:

This writ of error is prosecuted to reverse a judgment of the circuit court of Yazoo county, in which the plaintiffs were convicted and sentenced for the murder of Ely, a slave. A motion was made for a new trial on the following grounds, to wit: 1. Because the verdict was contrary to law and the evidence. 2. Because witnesses who should have been excluded were allowed to testify at the trial. 3. Because the court erred in charging the jury. And, 4, on the ground of improper conduct of one of the jurors.

The second and third grounds assigned in support of the motion seem to have been abandoned, as they have not been pressed upon our attention in the argument of the counsel for the prisoners. We have, however, examined them; and pass them with the single observation, that in our opinion they are clearly untenable.

The prisoners were slaves, the property of William M. Pickett; and Sam, another slave of the same master, was the principal witness examined for the prosecution. In fact, he was the only witness who was present at the commission of the alleged homicide. He was examined without objection; and, if credible, there is not the slightest pretence for saying that the finding of the jury was against the preponderance of the evidence. The effort is to discredit them; and it is conceded that, excluding his testimony, the verdict was unwarranted.

This witness (Sam), after having given a very and minute account of the killing, testified that the "accused threatened him that, if he ever looked as if he knew any thing about the matter, they would kill him; that he did not inform on the accused until the following Tuesday. His master told him he knew about the matter, and had struck him one lick to compel him to divulge it; but he denied all knowledge. But afterwards his master tied him, and he confessed all." William M. Pickett, the master, in his testimony, gave substantially the version of this part of the transaction. He stated that "he had never whipped Sam that he remembered; may have struck him with a whip one lick; but that he had told the negroes that some of them had killed Ely, and that he would find out who did it; and that whoever did it should be hung. Having heard that Sam (the witness) was last seen with Ely, he took him up, and told him he knew who killed Ely. Sam at first denied it; but he afterwards tied him, and told him to say who killed Ely. Sam never varied materially in the statements which he made in reference to the murder. They were the same as related from the witness-stand." The statements of this witness, on this occasion, were made in July, and the trial was had in the November following. And it does not appear that any menace or other means was subsequently used to induce the witness to persevere in his account of the transaction. From aught that appears from the record, his testimony at the trial was fairly given, and without the slightest appearance of constraint arising from any cause whatever. This conclusion is unavoidable; for otherwise the prisoner's counsel would, doubtless, have objected to the examination of the witness, or have moved to rule out his testimony, upon the ground of incompetency, or the court, at their instance, would have given to the jury proper instructions on the subject.

In the state of the case presented by the record, the exception applies exclusively to the credibility of the witness. His competency was conceded by the prisoner's omission to object to the introduction of his testimony. And whether the witness was credible or not, was a question which lay within the peculiar province of the jury.

The testimony of this witness bears upon its face very strong evidence of its truthfulness. It vindicates itself, and leaves no ground to doubt that he was an eye-witness of the transaction which he described. There is, however, a conflict between Sam and some of the other witnesses, arising from his statement of the time of day when he and the deceased left the plantation on their way to the lake, and their statements as to the time when the accused were seen at the quarter. But these were facts in regard to which the witnesses might have been most easily mistaken, and hence the greater probability that their statements would not agree. But Sam's testimony, in several important particulars, is corroborated by facts deposed to by other witnesses. Upon the whole, we cannot doubt that the jury were fully justified in giving full credit to his testimony.

The remaining ground, claimed as a cause of reversal, refers to the conduct of Holmes, one of the jury who returned the verdict. The facts relied on, as demonstrating the illegal conduct of Holmes, while acting as juror in the case, are stated in the testimony of the witnesses, who were examined on the trial of the motion.

The testimony of these witnesses is substantially as follows, to wit:

F. W. Battailé testified, that he was walking on the pavement, and opposite the court-room, about the time the cause was on trial; said Holmes, one of the jury, put his head out of the window, called to him, and asked witness to tell his (Holmes') wife to send him his supper. To which he replied, "Well," and afterwards delivered the message to Mrs. Holmes. The jury-room, where Holmes was, might have been sixty feet from the pavement, where witness was when called to by Holmes, and twenty feet from the ground.

Dr. Wilson to the same in substance, and in addition stated that Holmes' request and Battailé's reply was all that passed between them.

W. H. Mangum, an officer in attendance upon the jury, stated that, to his knowledge the jurors conversed with no one. That Holmes' son brought a note to Holmes, which the witness would not allow to be delivered, but took it from the bearer,

and told Holmes that he could receive no message from his wife.

And George W. Jones, special bailiff in charge of the jury, testified in addition to facts sworn to by the other witnesses, that the little son of Holmes, and a little negro boy, brought up Holmes' supper; they both came into the room where the jury were with the supper; but witness received the supper from their hands, and sent them to the opposite side of the room from the jury, at a distance of about sixty feet.

The general rule recognized by this court, and applied to questions similar to that which is before us, is, that if the verdict was rendered under circumstances in which its purity might have been affected, it must be set aside; and if it could not have been affected, it will be sustained. Hall v. The State, 4 How. Miss. Rep., 194.

Applying this rule to the case under examination, it is very clear that the evidence shows that there was no improper tampering with, or sinister influence brought to bear, upon the jury. It goes further, and renders it certain that there could have been none.

The judgment will therefore be affirmed.

NORRIS *v.* STATE, 33 Miss. R., 373.

SLAVE STEALING.

Under the Constitution, "in all criminal prosecutions, the accused hath the right to demand the nature and cause of action against him." And this right so secured requires that the facts which constitute the alleged crime, should be stated in the indictment with sufficient certainty to enable the accused to know with what offense he is charged, and to prepare his defense, both by plea of not guilty and of former conviction or acquittal.

An indictment under the statute, Hutch. Dig., § 4, p. 981, which provides that "every person who shall feloniously steal the property in another state or country, and shall bring the same into this state, may be convicted and punished in the same manner as if such larceny had been committed in this state," &c., must allege the stealing in such other state or country, and a bringing of the property into this state; otherwise it will be defective, and should be quashed. HANDY, J., *dissented.*

If the indictment merely charges the accused with a felonious stealing of property in the county in which it is preferred, he cannot be convicted of an offense under the fourth section of the act (Hutch. Dig., 981), because the indictment does not sufficiently charge the offense. Such indictment does not give the accused "the nature and cause

of the accusation against him," and precludes him from pleading a former conviction or acquittal in the state or country where the property was stolen. HANDY, J., *dissented.*

Error to Madison circuit court. HENRY, J.

Franklin Smith, for plaintiff in error,

Cited, Hutch. Dig., p. 1006, §§ 72, 73; Const. U. S., art. 4, § 1 and § 2, ¶ 2; ib., art. 5, 6, amended; ib., art. 3, § 2, ¶ 3; Const. Miss., art. 1, § 10; People v. Gardner, 2 Johns., 477; People v. Schenck, ib., 478; Simmons v. Commonwealth, 5 Binn., 617; Sarah v. State, 28 Miss., 269, 275; State v. Brown, 1 Hay, L. & E., R., 100; Green v. State, 23 Miss., 513; Vaughn v. State, 3 S. & M., 554; Ligon v. State, 8 ib., 699; 2 Mass., 23, note *a*; 2 East P. C., 771; Nightingale v. Adams, 1 Show., 89; Butler's case, 13 Coke, 53; Commonwealth v. Deacon, 10 S. & R., 125; Const. Ark., p. 19, §§ 10, 11, 24; Rev. Stat. Ark., 252.

T. J. Wharton, for the state,

Cited, Bishop Cr. Law, §§ 595–600; ib., §§ 650–655; 2 East P. C., 771, 772; 1 Hawk., P. C., ch. 33, § 9; 1 Mass., 115; 2 ib., 14; 5 Binn., 619, *et seq.*; People v. Burke, 11 Wend., 129; 4 Humph., 456; State v. Seay, 3 Stew. (Ala.), 123; Murray v. State, 18 Ala., 727; Hemmaker v. State, 12 Missouri, 453; Fox v. Ohio, 5 How. U. S. R., 410.

FISHER, J.:

This was an indictment in the circuit court of Madison county, charging the defendant with stealing a certain slave.

The indictment, consisting of several counts, charges the offense to have been committed in Madison county, and the court was accordingly asked on the trial to instruct the jury that unless they were satisfied the offense was committed in said county they should acquit the defendant; which instruction the court refused to give, and which refusal presents the most important question arising out of the evidence for our decision.

The evidence tended strongly to show that if the defendant were guilty at all of the larceny, he had stolen the slave in the state of Arkansas, and had brought him to the county of Madi-

son in this state; and the court, no doubt believing the defendant under this evidence could be convicted under a provision of the statute, which will be hereafter noticed, refused the instruction on the ground that it confined the action of the jury merely to one branch of the testimony, when it was believed to be competent for them to consider it as a whole, and if they believed it as a whole to be true, to convict instead of acquitting the defendant. The statute above referred to is as follows: "Every person who shall feloniously steal the property of another, in any other state or country, and shall bring the same into this state, may be convicted and punished in the same manner as if such larceny had been committed in this state; and in every such case such larceny may be charged to have been committed in any town, city, or county into or through which such stolen property shall have been brought." "Every person presented under the above section may plead a former conviction or acquittal for the same offense in another state or country." Hutch. Code, § 4, 5, p. 981. The indictment in this case merely charges the defendant with larceny in the county of Madison, and makes no mention of an offense in another state, and a bringing of the stolen property into this state.

The question, therefore, is not whether the testimony establishes an offense bringing the defendant within the provisions of the statute, but whether the indictment sufficiently charges him with the commission of such offence; for if not, it matters not how clear the proof may have been, it could not, under any just rule, establish more than the indictment itself charges. An indictment for a larceny committed in the county of Madison, in this state, in the usual form, and containing only the usual averments of such an indictment, wholly fails to give the defendant the least notice of an offense against the statute above quoted; for to constitute an offense against the statute there must be both a stealing of the property in another state or country, and a bringing of it into this state; and these facts both being necessary to constitute the offense, must be sufficiently set forth in the indictment in order not only to conform to a well-established rule of pleading, that the facts which constitute the crime or cause of action must be alleged with suffi-

cient certainty, but that the accused may know what it is that he is called on to answer, so that he may prepare for his defense accordingly. Such, certainly, is the spirit of the Constitution, and the right which it intended to secure to the accused in criminal prosecutions when it declares that "he hath a right to demand the nature and cause of the accusation" against him.

The government, in engrafting this provision upon its organic law, did not, as is by some erroneously supposed, proceed upon a principle of tenderness for those actually guilty of crime, but upon a more wise and humane principle, sanctioned by the experience of ages, that an innocent person may be unjustly accused of crime, and to afford him an ample opportunity, when so accused, to vindicate his innocence. If government could be absolutely assured that none but the really guilty would ever be put upon their trial for crime, it would perhaps not trouble itself to prescribe rules to govern such trials; but as this is utterly impossible, it must act upon the principle, as far as possible, of protecting the innocent, and punishing only the guilty; and almost all the rules which govern courts on the trials of criminal prosecutions, have their origin in this principle.

The object is not to screen the guilty, but to protect the innocent; and, by departing from a rule supported by the clearest dictates of reason, while it may be true that the guilty will but seldom, if ever, escape punishment, yet it may be equally true, that the innocent may, with almost equal facility, in many cases, be convicted, and unjustly suffer a punishment designed by the law for criminals only. It is, however, said, that the indictment in this case conforms to the provision of the statute which declares that the party may be indicted for a larceny at the place to which he shall have brought the property. This provision must be construed with reference to the other provisions of the statute. For instance, this is a good common law indictment, charging the defendant with a larceny committed in Madison county, but saying nothing concerning a larceny committed in another state. Now suppose the defendant had interposed a plea to the indictment, that he had been tried in a certain court in the state of Arkansas in regard

to the larceny charged in the indictment, and had been acquitted; would the plea have been considered as a good answer to such indictment? Most certainly not; for the obvious reason, that the indictment did not charge him with an offense committed in Arkansas, and that the acquittal there was no answer to a prosecution for an offense committed in another state. Or suppose that he had been tried in Arkansas, and had been convicted, and had, after receiving the punishment under the laws of that state, brought the property to Madison county, in this state. Here there would be both a stealing in another state and a bringing of the property into this state; but the law declares that this shall not be an offense against our law, and why? Because he had already been punished for the larceny in another state. Now, suppose he had pleaded this conviction as a defense to the indictment, would the plea have been received? Most certainly not; and why? Because the indictment presents no such case, but merely a case of larceny in the county of Madison. Or, if such a plea could be treated as good, why could not the defendant plead it to every common law indictment for larceny, and thus often delay the trial with an immaterial issue? The fifth section of the statute declares, that every person presented under the fourth section may plead an acquittal or conviction in another state or county. What does this section mean, when it declares that every person presented under the fourth section may interpose these matters in his defense? Most clearly it refers to a case where the indictment shows on its face that the accused is charged with an offense against the fourth section of the law. The defence, under the fifth section, can only be made when the prosecution is brought, by the terms of the indictment, within the provisions of the fourth section; and what is, therefore, the obvious meaning of the two sections as a whole? Clearly, that if the party is prosecuted for a violation of the fourth section, the indictment must so charge him, otherwise he could not avail himself of the benefit of the various matters in defense secured under the fifth section.

We are, therefore, of opinion that the court erred in refusing to give this instruction.

We are of opinion, that the court committed no error in refusing the other instruction, relating to the ownership of the slave.

Judgment reversed, and new trial granted.

HANDY, J., dissenting.

Being unable to concur in the opinion of the majority of the court, I will briefly state my views upon the subject.

The first question for consideration is, whether a person who has stolen property in another state, and brought it into this state, and has it in possession in this state, may be charged, in an indictment for the offense, with having committed the larceny in any county of this state, in which he may have possession of the stolen property, and whether such an indictment is sufficient, under the statute in relation to such an offense.

It appears to me, that the positive provision of the statute places this question beyond doubt. After prescribing the manner in which such felony shall be punished, the statute goes on to provide, "that in every such case, such larceny may be charged to have been committed in any town, city or county into or through which such stolen property shall have been brought." Hutch. Code, 981, § 4. This language is too clear to admit of construction. It can mean nothing but that it shall be sufficient to charge in the indictment, that the larceny was committed by the accused in any town, city or county into which he may bring the stolen property; in other words, that it shall not be necessary to charge in the indictment, that the property was stolen in another state, and brought into this state.

The reason and policy of this possession is manifest. It is founded upon the idea, that bringing stolen property into this state from another state, and having possession of it here, is a substantive mischief; because our citizens may be injured by being induced to become purchasers of such property, and afterwards be deprived of it by the rightful owner; and hence it was deemed necessary to prevent it by stringent laws. The statute plainly intended to dispense with the necessity of charging the felony to have been committed in another state, in order to avoid the fullness of proof of such an averment, re-

quired by the rules of evidence in criminal cases, and for the want of which, and considering the difficulty of making such full technical proof, the offender might escape punishment. The felonious taking in another state is not the evil intended to be punished, or prevented by the statute. That is merely preliminary to the mischief contemplated, though in continuation of the original larceny. It is the bringing into this state which was intended to be prevented. As that was the substantive offense in contemplation, it was the intent of the statute to avoid the difficulties incident to an averment that the accused feloniously took the property in another state, to recognize a less degree of proof of that fact, than would be necessary to sustain a distinct averment of it in the indictment; and, if the property was found in the possession of the accused in this state, and was proved to have been taken from the possession of the owner in another state, and the accused was unable to give any satisfactory explanation of his possession, in such cases to leave it to the jury to say, whether the property was stolen by the accused in the state from which it was taken. It was not intended to dispense with all proof of the taking in another state, but to dispense with the strictness of proof required to support an averment of that fact in the indictment. The policy of such regulations may be a matter of question, but that it is so written in the statute, appears to me to be a fact about which there can be no doubt, and too plain for construction.

It is said that the following section of the statute, which allows the felon to plead a former conviction or acquittal for the same offense in another state, shows that it was not intended by the preceding section to dispense with the averment of felonious taking in another state, because he would be debarred of the privilege secured to him by this section, if the indictment here did not charge the taking in the other state, and thereby identify the offense. But I do not perceive the force of this view. The record from the other state would certainly particularize the offense; and if the larceny there charged was the same in fact as that upon which the indictment here was founded surely the accused would have a perfect right, and

it would be entirely competent for him to introduce, in support of his plea of former conviction or acquittal, the record from the other state, and show, by testimony, that the two charges were founded upon the same felonious taking. The identity of the offenses is to be proved by other testimony than that of record. Arch. Cr. Pl. 86, 4th Amer. ed. If the provision of this fifth section was, that the acquittal or conviction in this state might be pleaded in bar of a prosecution for the same offense in another state, the view taken would be well founded. But that is not the provision of the statute; and if it was, it would be absurd, for the legislature could not prescribe rules of judicial proceeding to courts of other states.

It appears to me, therefore, that no aid is derived to the construction contended for from this section of the statute.

Another ground of error, which is considered by the majority of the court as well taken, is, that the offense for which the accused was tried is not charged in the indictment with the requisite certainty to sustain the conviction.

I have attempted to show that the statute prescribed the mode of charging offenses of this character, and authorizing the form adopted in the indictment in this case; and it appears to me that the averment is sufficiently certain for all reasonable purposes of defense. The accused is charged with stealing a slave in Madison county, with a designation of the name of the slave and of his owner. He is thus informed of "the *nature* and *cause* of the accusation against him"; of its *nature*, which consists in feloniously stealing property; and of the *cause*, which consists in the designation of the thing stolen, and of the name of the owner. He has brought this stolen property into this state, and has it in his possession; and he is charged with having feloniously stolen it in this state; and under our laws the gravamen of the charge consists in having the stolen property in his possession here. For what purpose is he entitled to notice of the nature and cause of the charge? Certainly for no other purpose than to enable him to understand it so distinctly, that he may prepare himself to show that it is untrue. Now he is charged with stealing a particular slave in Madison county. The prosecution makes out a *prima facie* case against

him, by showing that the slave belonged to a person in Arkansas, from whose possession he was recently taken, and the slave is shortly thereafter found in the possession of the accused in Madison county. If he prove that he did not steal the slave at all, of course he establishes that he neither stole him in Madison county nor in Arkansas. And this he has a perfect right to do if the charge be untrue. And what is the plain and natural way for him to meet the case thus made out against him? Certainly by showing that the slave is his property, or that he is the property of another person, and is legally and rightfully in his possession; and if he establishes such a right, it is immaterial whether the evidence against him tends to prove that he committed the larceny in Madison county or in Arkansas. Having been notified that he is charged with having stolen a particular slave, he is thereby enabled to prepare his evidence to justify his possession; and if he does so, he certainly disproves the charge that he committed the larceny in Madison county.

The accused is entitled to be informed of the "nature and cause of the accusation," but not of the evidence by which the charge is intended to be established. It was a substantive offense against our laws that the accused had the stolen property in his possession in Madison county. He was indicted for that offense, with a description of the property alleged to be stolen. And the particular circumstances constituting the offense were mere matters of evidence, offered for the purpose of establishing the charge; and if the accused was uninformed in relation to anything in the case, it was not as to the "nature and cause of the accusation," but of the particular facts tending to establish the charge.

This view I consider to be amply sustained by authority. Where goods were stolen by a person in one county in England and carried into another, he might be indicted in any county into or through which he might carry the goods as for a larceny committed in that county; because, in contemplation of law, there was a taking and carrying away in every county into which the goods were carried. Archb. Cr. Pl., 21, 22, and cases there cited; 4 Bl. Com., 304; 2 East P. C., 771. So, under the statute of 7 and 8 George 4, ch. 29, a person having

stolen goods in any part of the United Kingdom, and taking them into another part, was indictable for larceny as having been committed in that part of the kingdom where he had the goods in possession. Archb. Cr. Pl., ib. And though the rules of criminal pleading are held with as much strictness in England as in this country, and the accused is equally entitled there to be informed, with all proper certainty, of the nature and cause of the charge against him, as he is here, it has never been held there that such indictments are defective, or that they will not be sustained by evidence of the original taking in one county or part of the kingdom, and a carrying away into another place. It appears to me to be impossible to distinguish these cases in principle from that before us with reference to the point under consideration.

And the same rule has been sanctioned in this country whenever statutes similar to ours have been passed, and have become the subject of judicial decision. In New York, Missouri, and Alabama, statutes containing the same provisions as ours, and nearly in the same language, have been pronounced constitutional by their supreme courts, and indictments framed like the one in this case have been sustained, and convictions under them affirmed. The People v. Barker, 11 Wend., 129; Hemmaker v. State, 12 Missouri, 454; The State v. Seay, 3 Stewart (Ala.), 123; Murray v. State, 18 Ala., 727.

I am, therefore, of opinion that the indictment in this case is well framed to embrace the case made out by the evidence, and that it was competent to show, by evidence, that the slave was stolen in Arkansas, and found in the possession of the plaintiff in error in this state.

JENKINS *v.* STATE, 33 Miss. R., p. 382.

SHERIFF.

Judgment *nisi* against a sheriff for failing to return a bench warrant is void if entered without notice.

In error from the circuit court of Madison county. HENRY, J.

Gibbs and *Wilkinson*, for plaintiff in error.

D. C. Glenn, attorney general.

HANDY, J.:

It appears by the record that at the April term of Madison circuit court, 1856, a motion was made in behalf of the state for a fine against the plaintiff in error, sheriff of Yazoo county, for failing to make return of certain bench warrants to the April term, 1855, issued upon an indictment in that court, and made returnable to that term of the court. A judgment *nisi*, &c., was rendered upon the motion, and a *scire facias* was issued thereupon, to which the plaintiff in error appeared and pleaded, among other things, that no notice whatever was given to him of the motion against him.

The record contains nothing showing that notice was given, nor does the judgment *nisi*, &c., show that it appeared to the court that any notice of the motion was given to the sheriff. In this state of the case it was submitted to the court upon the above plea with other pleas, and a judgment final was awarded upon the *scire facias*.

This judgment was manifestly erroneous. The statute upon which the proceeding was founded, expressly requires that the fine shall be entered upon "reasonable notice being first given to the sheriff." The record should have shown that such notice was given of the motion either by written notice executed and returned, or by his appearance to the motion, or by statement in the record of the judgment *nisi*, that it appeared to the court that due notice was given. And without such evidence of notice, the judgment on this plea to the *scire facias* should have been for the defendant below.

The judgment is reversed, and a judgment ordered for the defendant on the *scire facias*.

OGLE v. STATE, 33 Miss. R., 383.

HOMICIDE.

Applications for continuance are always addressed to the sound discretion of the court; and it is only where this discretion has been greatly abused that it can be assigned for error.

An affidavit that subpœnas had been issued for absent material witness which were "not executed" by the sheriff, and that he expected to prove by such witnesses an unfriendly feeling between the deceased and the defendant, is insufficient for a continuance.

A person who has not formed or expressed an opinion as to the guilt or innocence of the prisoner who is indicted for murder, but has an impression on his mind, formed from rumor, in relation to the killing, which it might require evidence to remove, is competent as a juror. Per SMITH, C. J., and HANDY, J.

But in such case, although the juror may be incompetent, a new trial will not be granted if the prisoner exercises his right of peremptory challenge, unless it be shown that he exhausted his peremptory challenges, and was thereby liable to have other jurors equally objectionable forced upon him. Per FISHER, J.

A verdict of guilty of manslaughter will not be set aside for an error in the court below in refusing to give instructions asked for by the prisoner, the object of which was to reduce the crime from murder to manslaughter.

Error to Holmes circuit court. HENRY, J.

At the April term, 1856, of the circuit court of Holmes county, Lewis Ogle was indicted, tried, and convicted of the murder of one W. P. West. A new trial was granted, and at the following October term he was again tried and found guilty of manslaughter in the first degree. At that time the prisoner applied for a continuance on account of the absence of Thomas Gray, by whom he expected to prove, as he stated in his affidavit, that the deceased and the defendant were very unfriendly up to within a short time previous to the killing; and also on account of the absence of John Hubbard and John Shiph, by whom he expected to prove that the deceased was exceedingly quarrelsome when drinking; and that the prisoner would prove by other witnesses that deceased was drinking on the day of the killing. The affidavit stated that subpœnas had been issued for these witnesses in due time, and that they were not absent without his consent. The district attorney refused to admit the truth of the facts stated in the affidavit, and the court deeming the application insufficient refused a continuance.

During the empaneling of the jury, one Webster, who had been returned by the sheriff on the special *venire*, was called, and upon examination touching his qualifications as a juror, he stated "that he had, from rumor, formed some opinion, or rather impression, of the killing, but that he had no opinion then of the guilt or innocence of the prisoner, as he had heard none of the circumstances or evidence." The prisoner's counsel then asked Webster if it would require evidence to remove the

opinion he had formed, to which he replied that it might require evidence to remove his impression as to the killing, but he had no opinion as to the guilt or innocence of the prisoner. The prisoner's counsel then challenged said juror for cause, but the court decided him to be competent, and the prisoner excepted. The prisoner then challenged the juror peremptorily. The prisoner pleaded not guilty, and was found guilty, and he brings the case to this court.

J. W. Wood and *R. A. Anderson*, for plaintiff in error.

D. C. Glenn, attorney general.

FISHER, J.:

The prisoner was put upon his trial at the October term, 1856, of the circuit court of Holmes county, for the murder of one William P. West, and was by the jury found guilty of manslaughter in the first degree. To have the sentence pronounced upon this verdict, and the proceedings leading thereto, revised by this court, this writ of error has been prosecuted.

It appears that before going into the trial the prisoner moved the court for a continuance on account of the absence of certain witnesses whose testimony he deemed material in his defence. He sets forth in his affidavit that subpœnas for each of said witnesses had been issued, and returned by the sheriff not executed. That he expected to prove by one witness that the prisoner and the deceased were on friendly terms up to the time of the killing, and by another that the deceased was very quarrelsome in his disposition when drinking. Applications of this kind are always addressed to the sound discretion of the court; and it is only where this discretion has been manifestly abused that the action of the court below can be assigned as error.[1]

[1] Archbold Cr. Pr. & Pl., 566-7-8; State v. Hildreth, 9 Iredell, 429; State v. Patterson, 1 McCord, 177; Green v. State, 13 Mo., 382; Baxter v. People, 3 Gilman, 368; McKinney v. People, 2 ib., 540; State v. Thomas, 8 Rich., 295; Flott v. Com., 564. But the discretion in such cases cannot override a clear legal right, or dispense with a plain rule of law. The court, therefore, cannot refuse a continuance on the ground that "it does not place much confidence in the truth of the defendant's statements." Fox v. State, 9 Geo., 373. In Alabama and North Carolina it has been held that this discretion of the court cannot be reviewed on error. Lindsay v. State, 15 Ala., 43; State v. Duncan, 6 Iredell, 98. And in Woods v. Young, 4 Cranch, 237, the Circuit Court of the United States for the District of Columbia laid down the same rule generally, and without qualification. It was doubted by the general court of Virginia in

But even under a more liberal application of the rule in the case at bar, we feel no hesitation in saying that the court below committed no error in refusing the continuance. Conceding that proper diligence had been used to compel the attendance of the witnesses, their testimony could not have varied the result. Admitting the truth of the statements of the affidavit, and giving to the facts the greatest weight to which they were entitled in favor of the accused, a mere doubt as to the question of malice could at most have been created on the minds of the jury.

The testimony of itself is too weak to weigh against the positive and direct testimony introduced on the part of the prosecution; and indeed it must depend for its weight more upon the weakness of the testimony of the state than upon any merit of its own. There doubtless may be cases where such testimony might form important links in the chain of evidence, and where it might turn the scale in favor of the accused; but, as already remarked in the present case, it could do no more than to create a doubt as to the question of malice. And thus viewing it, in connection with the evidence of the state, we are compelled to sustain the action of the court below in this respect.[1]

Smith v. Com., 2 Virg. Cas., 6, though they agreed it was a matter of discretion, and that error would not lie unless the case was a very plain one. The same doubt was expressed in Holt v. Com., ib. 156, and the writ of error denied. Also in Bledsoe v. Com., 6 Rand., 673, 674. In Indiana, in Detro v. Smith, 4 Ind., 200, a large discretion was allowed the circuit court on a question of continuance; but in most of the later cases in that state little has been said about discretion, and the right to a continuance has been generally regarded as a question of law arising upon the statements of the affidavits. Hubbard v. State, 7 Porter, Ind., 160; Fuller v. State, Blackf., 63. In Georgia the supreme court has said that it must be a most arbitrary and oppressive exercise of power on the part of the presiding judge to authorize a court of error to interfere. Sealy v. State, 1 Kelly, 213; Copenhaven v. State, 4 Geo., 23. In this state it may be said to be settled that where a clear error has been committed in refusing a continuance, without the correction of which a manifest injury will be done, a court of error will interfere; and the party excepting must embody all the testimony in his bill of exceptions, that the court above may see the bearing of the whole case, and thus judge of the ground of the application. McDaniel v. State, 8 S. & M., 401; and see Howell v. State, 5 Geo., 48; Holmes v. People, 5 Gilman, 478; Spence v. State, 3 Blackf., 282; Roberts v. State, 4 Geo., 6, 8.

[1] To obtain an order of continuance the affidavit must be full, satisfactory, and direct as to material allegations for a continuance. Knight v. State, 5 Humph., 599. The affidavit must state facts in order that the court may determine their importance; deponent's opinion of undisclosed facts can constitute no safe or proper grounds for the action of the court. Rhea v. State, 10 Yerg., 258; McDaniel v. State, 8 S. & M., 401. It must state the names and places of abode of the absent witnesses, and that they are material to the prosecution or defense. 8 East, 35; Foster, 2; Mull's case, 8 Gratt., 695; Hurd's case, 5 Leigh, 715; Gordon v. Spencer, 2 Blackf., 286. The affidavit

Again, a juror, being pronounced competent to the court, was tendered to the prisoner, and he was either compelled to accept him or to exercise his right of challenge. The juror, in answer to the question, whether he had formed or expressed an opinion as to the guilt or innocence of the accused, stated that he had neither formed nor expressed such opinion, but that he had an impression as to the killing from rumor, which it might require evidence to remove. The chief justice and my associate, Judge Handy, are of the opinion that this case is clearly distinguishable from the case of Nelms v. The State, and others in this court, and that the juror was competent. Not, however, being able to yield a full concurrence in their opinion on this ground, I am, nevertheless, of opinion that the record shows no error on this point for which this court can reverse the judgment. The juror not having been accepted, but set aside under the peremptory challenge of the prisoner, he must show that

should be positive that the absent witness is material, and not merely that the deponent believes him to be so. Bacon's Abr., Trial, 26. Where the affidavit of the accused states that he expects to prove by the absent witness that he heard the witness upon whom the state mainly rely for a conviction, say that "if hard swearing would send the defendant to the penitentiary, he would go," the showing is sufficient.

The party moving for a continuance must show that he has used a reasonable degree of diligence (Fiott v. Com., 12 Gratt., 564; Weeks v. State, 31 Miss., 490; Hurd's case, 5 Leigh, 715; People v. Baker, 1 Cal., 403); as that the absent witness has been subpœnaed (Wright v. State, 18 Geo., 888), or an effort in that direction made. As to what will constitute due diligence, see Dutton v. State, 5 Port. Ind., 533; Hall v. State, 8 ib., 439.

If the witness was not absent at the time notice of trial was given, it seems the court will not grant the application on account of any subsequent absence. Barnes, 442. And where the witnesses are in a foreign country, and not likely soon to appear, the court will refuse to allow it; though, as the witness may be examined on interrogatories sent out abroad, it should seem that when the evidence is very material the trial may be delayed till such examination can be had. 1 Chitty Cr. Law, 492. But when the defendant has been guilty of *laches* or delay, the court will refuse to put off the trial, or at least will impose terms upon him, as that he shall consent to examine upon interrogatories a material witness for the people. Ib., 1 Black., 514; 2 M. & S., 602; Com. v. Gross, 1 Ashm., 281; see also Com. v. Millard, 1 Mass., 6; State v. Fyles, 1 Comst., 234; Allen v. State, 10 Geo., 85.

The improper refusal of a continuance may be cured by the witness appearing and testifying. Weeks v. State, 31 Miss., 490.

As to continuances, see generally the cases above cited, also Archbold Cr. Pr. & Pl., 168, *et seq.*; Wharton Am. Cr. Law, 2929, *et seq.*; Colton v. State, 4 Tex., 260; 8 East, 37; 3 Burrow, 1514; 1 Wm. Blackstone R., 514; Com. v. Hilliard, 1 Mass., 6; State v. Zellers, 2 Halst., 220; State v. Fyles, 3 Bev., 804; U. S. v. Gibert, 2 Sumner, 19; 8 East, 37; Earp v. Com., 9 Dana, 302; Bledsoe v. Com., 6 Randolph, 673; Com. v. Gross, 1 Ashmead, 281; Melstead v. Redman, 3 Munford, 219; 1 Dallas, 9; King of Spain v. Oliver, Peters C. C., 217; Fiott v. Com., 12 Gratt., 264; Foster, 40; 1 Wheeler C. C., 30; Rex v. Jones, 8 East, 34; State v. Duncan, 6 Iredell, 98; People v. Thompson, 4 Cal., 238.

the decision of the court was not only wrong, but that, having to exercise his right of challenge to get rid of the juror, he, the prisoner, exhausted his challenges, and, having done so, he was liable to have other jurors equally or more objectionable forced upon him. The question is not whether the court erred as to some minor point on the trial, but whether the objection which existed as to this person who was tendered as a juror, and rejected by the prisoner, existed as to any of the jurors who sat upon the trial; for if not, how can it be said that the prisoner has not been tried by an impartial jury, free from bias or preconceived opinions. The question, to my mind, is whether there is any valid objection which can be urged against any or all of the jurors who sat upon the trial, and not whether objectionable persons were summoned and pronounced competent jurors by the court, but not taken by the prisoner. One of the very objects of the law in giving the prisoner the right to challenge a certain number, according to his own discretion, was to protect him against the action of the court in selecting the jury. But if an impartial jury has been selected, as we must presume it to have been, unless the contrary be shown, how can it be said that the action of the court, though wrong on this point, has been prejudicial to the prisoner?

The last error assigned relates to the action of the court in giving, modifying, and refusing certain instructions on behalf of both the prosecution and the defense. This error may be briefly disposed of. The object of the instructions on behalf of the prisoner was to reduce the crime from murder to manslaughter; and admitting that the court erred, both as to the modification made to the instructions given and as to those refused on behalf of the prisoner, there is still no error of which he can complain, for the reason that the very object sought to be accomplished by the instructions has been attained by the verdict of the jury acquitting him of murder, and finding him guilty only of manslaughter. The action of the court could have only been the subject of revision in the event of a verdict for murder having been returned by the jury, not intimating that even then it would have been objectionable. We have deemed it unnecessary to notice the testimony in the record.

It will be sufficient to remark in regard to it, that in our opinion the jury has given the prisoner the benefit of every reasonable doubt which could exist in finding him guilty of the highest degree of manslaughter.

Judgment affirmed.

BEASON v. STATE, 34 Miss. R., 602.

GAMING.

The affirmative of an issue upon defendant's plea in abatement denying the competency of one of the grand jury is on the state; and on the trial of such an issue one of the grand jury is incompetent to sit as a petit juror.

Every instruction which has not some particular application to the issue before the jury should be refused.

The declarations of a party, the place of whose domicile is in issue, are competent but not conclusive evidence of the *animus manendi*, or *animus revertendi*, with which he had left the state.

Error to Hancock circuit court. HANCOCK, J.

R. Seal, for the plaintiff in error,

Argued the case, and cited Story on Conflict of Laws, 39.

T. J. Wharton, for the state.

HANDY, J.:

This was an indictment for playing at a game of hazard for money, contrary to the statute, to which the defendants pleaded in abatement that Samuel White, Jr., one of the members composing the grand jury by whom the indictment was found, was not, at the time the bill was found, an inhabitant and citizen of the county in which it was found, but was in fact then a citizen of the state of Louisiana. Upon this the state took issue, and a trial was had thereupon, which resulted in a verdict for the state.

The case is brought up upon several bills of exception taken to the rulings of the court during the trial, and in overruling a motion for a new trial; and upon this several grounds of error are insisted upon, which will be noticed in the order in which they appear in the record.

The first error assigned is in the ruling of the court that the

proof of the affirmative of the issue joined was upon the state. This was manifestly correct. The plea denied the material fact upon which the validity of the indictment depended, that one of the grand jurors was a resident of the county, and upon that denial the state took issue. It was, therefore, upon the state to establish the fact denied, and which was material to sustain the indictment.

The next objection is taken to the court's overruling of the defendant's challenge of John Moore, one of the jurors who tried the issue. That juror was challenged by the defendants on the ground that he had been a member of the grand jury by whom the indictment was found, but the challenge was not allowed.

It has always been considered good cause of challenge that a juror was under any bias, and upon that principle it is laid down as good ground of objection to a juror that he was formerly a juror in the same cause. 3 Bl. Com., 363. By reason of the bias which must be presumed to exist in his mind under such circumstances, he cannot be altogether free and impartial to try the issue. And the reason of this rule is applicable in all its force to grand jurors who had participated in finding the indictment and were afterwards called to sit as jurors upon the trial; for such a juror would naturally take his seat upon the jury to try the issue with the impression, if not with the decided bias of mind, that the indictment was just and true, and should be sustained; and accordingly it has been considered a good cause of challenge of a juror that he was a member of the grand jury who found the indictment. State v. O'Driscoll, 2 Bay, 155; Barlow v. State, 2 Blackf., 114. There was error, therefore, in overruling the challenge of this juror, and in permitting him to sit upon the trial.

The next objection applies to the instructions given to the jury at the instance of the state, and in the refusal of those asked in behalf of the defendants. There appears to be no error in those given in behalf of the state. The rules applicable to the issue are clearly and correctly stated, so as to enable the jury to determine the question submitted to them upon proper principles.

The first instruction asked in behalf of the defendant is, "That before a man can be put upon his trial by a petit jury, an indictment must be presented against him by a grand jury above all exceptions, of his own county; and this is a constitutional right of which every man has the right to avail himself."

This instruction appears to have no particular application to the issue before the jury, which was, whether a particular member of the grand jury was a resident of the county when the indictment was found. It was not calculated to direct the jury as to any practical point or principle necessary in determining the issue, and it was, therefore, irrelevant, and properly refused.

The other instruction is, "That if the jury believe, from the evidence, that the grand juror, White, went to New Orleans with the open and avowed intention of remaining there if he could get business, and did actually get a situation, and entered upon his business there, before the last term of the court, then there was a change of his domicile, and they should find for the defendants."

The point of this instruction depends upon the fact of the juror going to New Orleans, with *the open and avowed intention* of remaining there if he could get into business; and if he did get into business, that that was conclusive of his change of residence. But the true question was, not what he declared to be his intention—for, though such declarations were competent evidence, they were not conclusive of his real intention—but what was his real intention in going to New Orleans. It is plain that he might have declared his intention of becoming a resident there upon obtaining business, and yet afterwards have changed his mind, and not really have intended to become a resident of New Orleans, when he entered upon business there. So that the minds of the jury should have been directed to the fact, what was his intention, as to residence, when he entered into business in New Orleans, and not what he had previously declared as to his intention. In this respect, the instruction is erroneous, and was properly refused. The instruction was also unnecessary, because the rule upon the point had already been stated in the fifth instruction given at the instance of the state,

which stated the rule as favorably to the defendants as was proper.

It is also objected that the verdict was contrary to the evidence, and, therefore, that a new trial should have been granted. We deem it unnecessary to consider this point, as the case will go back for a new trial, and it is not proper that we should express an opinion, which might have an effect upon the trial of the issue.

An objection is also here taken to the organization of the grand jury. But as that objection was not made in the court below, it cannot be noticed here.

For the error above stated the judgment is reversed, and the cause remanded for a new trial.

BLEWETT v. STATE, 34 Miss. R., 606.

GAMING.

To constitute the offense of gaming under the statute, one or other of the parties must gain by the game. But in a game of billiards, in which the loser pays a fee to the owner of the table for its use, neither of the players gain anything. *Hyo*, such a game of billiards is not gaming under a statute.

Error to Lowndes circuit court. HARRIS, J.

James T. Harrison and *T. R. Crusoe*, for plaintiff in error.

In this case there was no bet or wager on the result of any game of chance. It was a game of billiards, played in a regularly licensed billiard saloon, and according to the rules of such saloon the loser of the game was required to pay a fee to the owner for use of the table; and this cannot amount to gaming.

At common law gaming houses were indictable as a public nuisance; but unless restrained by statute, ordinary wagers, or betting, were tolerated as being for amusement or recreation. 1 Chitty's Cr. Law, 677; 1 Russ. Cr., 300, 406; Vanderworker v. State, 13 Ark., 700; Norton v. State, 15 Ark., 72.

"It seems that by common law, the playing at cards, dice,

&c., when practised innocently, and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any offense whatever." 4 Bac. Abr. (Am. Ed.), title Gaming, A., 17.

A billiard-table was not indictable at common law, unless it was used for the purpose of gambling. Butler's case, 1 City Hall Recorder, 67.

Billiards and bowling are frequently used for the purpose of amusement and recreation, and it is customary for the losing party to pay the proprietor a reasonable compensation for the use of a table, alley or saloon; and paying for such game by the loser is not gaming within the meaning of the law. People v. Sergeant, 8 Cow., 140; Lewis' U. S. Cr. Law, 341, 343, 344; Waterman's Archbold, 609, 610, 611; Williams v. State, 12 S. & M., 38; 2 Dana, 298; 7 Yerger, 526; 5 ib., 160; Anthony v. State, 4 Humph., 85; 8 Blackf., 403; Hale v. State, 8 Texas, 171, 172; 4 Indiana, 560. The rule of the game was a matter of fact, which the court had no right to decide. Armstrong v. State, 4 Blackf., 247, 248, 249; Montee v. Commonwealth, 3 J. J. Marsh., 134; Glasscock v. State, 10 Missouri, 509, 510.

The offense was committed within the corporate limits of the town of Columbus. Acts 1854, p. 438, § 8; Legoir v. State, 8 S. & M., 699; Montgomery v. State, Opinion Book "G," 4.

T. J. Wharton, attorney general.

FISHER, J.

This was an indictment in the circuit court of Lowndes county, charging the defendant with playing for money, or other valuable thing, at a game of billiards.

The proof is, that the playing was at a regularly licensed table for that purpose, and the defendant being the loser of the game, it was presumed that he paid the regular fee chargeable by the owner of the table. Supposing both facts to be true, still no offense was established against the law.

To constitute gaming, one or other of the parties must expect to profit by the game. Here neither could derive such profit, because neither was entitled to the fee paid to the owner of the table.

Admitting that it is the rule of the game, that the loser shall pay the fee, the owner has a perfect right to make his contract in this way, the law not prohibiting this mode of contracting.

Judgment reversed, and *venire de novo* awarded.

BOX *v.* STATE, 34 Miss. R., 614.

GAMING.

The manner of selecting the grand jury from those summoned to attend as grand jurors, and who are in attendance, is left to the discretion of the court; and it will not be improper for the court to cause them to be sworn and empaneled in the order in which their names are returned by the sheriff, until a sufficient number are sworn to constitute the grand jury.

A grand jury, under the statute, composed of more than eighteen, and less than thirteen persons, is illegal, and an indictment found by them is void and should be quashed.

Error to Clarke circuit court. HANCOCK, J.

J. D. Freeman, for plaintiff in error.

T. J. Wharton, attorney general.

HANDY, J.

The plaintiff in error was indicted for gaming, contrary to the statute, and he pleaded in abatement, that the grand jurors by whom the indictment was found, were not drawn by lot from the whole number of persons summoned by the sheriff, and in attendance as grand jurors, for the term at which the indictment was found. To this a demurrer was filed and sustained, and judgment was thereupon rendered against the plaintiff in error.

The question thus presented is, whether, under the act of 1854, prescribing the mode of summoning grand jurors, which was made general by the act of 1856, chap. 3, it is necessary to the legal constitution of a grand jury, that the names be *drawn by lot* from the persons summoned and returned by the sheriff as grand jurors. We can perceive nothing in the statutes referred to, requiring such a course.

It is manifest that the old mode of drawing jurors by lot is abrogated, and a new mode of summoning and empaneling them established by the statute. We have held at this term, that as to the number of persons to compose the grand jury, the statute must be construed with reference to previous acts upon the subject, not repealed, either positively or by implication; and consequently, that although twenty persons were required to be *summoned* to attend as grand jurors, yet it was not intended to make any change in the law, as to the number necessary to compose a legal grand jury. Miller v. The State, 33 Miss. R., 356.

But the manner of *selecting* the persons to compose the jury is not prescribed in the statute, and the old mode is abolished. What course, then, is to be pursued in the proceeding? It appears to be a matter left to the sound discretion of the court, and no good reason can be perceived why the court should not cause the jurors to be sworn and empaneled in the order in which their names are returned by the sheriff, until a sufficient number be sworn to constitute a legal jury.

The second plea sets up the additional ground of defense, that the grand jurors were not drawn "not less than thirteen, nor more than eighteen, as required by law." And this plea was also demurred to, and held insufficient.

This comes within the decision in Miller v. The State; as the plea alleges, in substance, that the grand jury were not composed of the number of individuals required by law.

Upon this ground the judgment must be reversed, the demurrer sustained, and the indictment quashed.

HAGUE *v.* STATE, 34 Miss. R., 616.

HOMICIDE.

Where the record states that the indictment was returned on the 4th of November, during the *October* term, and the indictment appeared on its face to have been found at the *November* term, and nothing in the record identified the indictment on which the indictment was had, a motion in arrest of judgment should be sustained. Laura v. State, 26 Miss. R., 174.

In the absence of all proof of the facts or circumstances attending a homicide, the law presumes it to have been malicious, and therefore murder.[1] But under such circumstances the law never presumes it to have been manslaughter.[2] Such a presumption would be error.

Error to Choctaw circuit court. HARRIS, J.

Featherston & Orr, for plaintiff in error.

T. J. Wharton, attorney general.

FISHER, J.:

The prisoner was indicted by a grand jury empaneled at the October term, 1853, of the circuit court of Chickasaw county, for the murder of one Harmonious Parker. The venue was at the next succeeding term of the court, changed, upon the application of the prisoner, to the county of Choctaw; and being put upon his trial at the September term, 1855, of the circuit court of said county, he was by the jury found guilty of manslaughter in the first degree, and from the sentence pronounced upon this verdict, he has prosecuted this writ of error.

Although numerous errors relating to the technical objections to the record have been assigned, we nevertheless believe that the whole merits of the case are embraced in the two assignments, which bring under revision the action of the court below in overruling the prisoner's motions in arrest of the judgment, and for a new trial; and these will, therefore, only be noticed.

First, as to the motions in arrest of judgment. The first order upon the minutes in relation to the return of the indictment into court is in the following words:

"The State v. Sidney F. Hague. Murder.

"This day came the grand jury, under the charge of their proper officer, and returned into open court, by the hands of their foreman, a bill of indictment against Sidney F. Hague for the murder of Harmonious Parker, endorsed by their foreman, Thomas J. Buchman, a true bill."

Next follows in the record this recital of the clerk: "And

[1] State v. McFall, Addis., 255; State v. Town, Wright, 75; People v. McLeod, 1 Hill, 377; Mitchell v. State, 5 Yerger, 340; Comm. v. York, 9 Metc., 93; Murphy v. State, 37 Ills., 447.

[2] King v. Commonwealth, 2 Va. Cases, 116; Short v. State, 7 Yerger, 710; Young v. State, 11 Humph., 200.

afterwards, to wit, on the same day, it being the 4th day of November, 1853, and also a day of said October term of said court, the following arraignment and plea was entered on the minutes of said court, to wit." Immediately following this recital is the indictment upon which the prisoner was tried, and it appears upon its face to have been found, not at the October term, but at the November term of the said court; and it may be further remarked, that there is nothing in the record showing, with that degree of certainty required in such cases, that it is the same indictment which was returned into court by the grand jury. The error, therefore, being palpable, the case falls completely within the rule laid down in the case of Laura v. The State, 26 Miss. R., 174; and the motion in arrest of judgment should have been sustained by the court below.

Under the view which we have taken of the first assignment, the other alleged error is only important to show that the case was tried upon its merits in the court below; and the prisoner, having been acquitted of the charge of murder, will be entitled to his discharge, unless it shall appear that an indictment for manslaughter can be hereafter preferred against him.

The testimony connecting the prisoner with the homicide was entirely circumstantial; but it was, nevertheless, of that conclusive character which pointed to him, with almost unerring certainty, as the only person who could have committed the deed. Indeed, the question is not as to the person who committed the act, but as to the grade of the crime, if any.

It is not necessary to notice, in detail, the testimony, but only to state the prominent facts established.

The killing occurred near a spring in the woods, and near the residence of the prisoner, on a Sunday evening, between seven and eight o'clock, in the month of September, 1853. It appears that the deceased, a short time after sunset of that evening, rode up to the residence of old Mr. Hague, with whom the prisoner resided, and inquiring for the prisoner was informed that he was in the house. Whereupon the deceased requested the old man to call the prisoner out. Some reluctance being manifested, the deceased observed, "If you don't call him, I will." The prisoner soon thereafter came out of the house, went to the

deceased; they appeared to meet on friendly terms, conversed a few minutes, and both started off together to the spring, about one or two hundred yards in the woods. They were seen together near the spring, and near where the body of the deceased was found. Soon thereafter a noise was heard indicating distress, which, alarming persons in the vicinity, caused them to go to the spring to ascertain the cause of distress, and on arriving there it was ascertained that the deceased had been stabbed in the breast, from which he died in a few moments. Nothing then appears to have been seen of the prisoner, though he appears to have been at home at ten o'clock that night. It also appears that blood was discovered in several places, on the leaves, on the ground, and on the bushes, and that about twenty-two paces from the blood a pistol was found; but what became of this pistol does not appear. One was exhibited in court which resembled one seen in the possession of the prisoner the day before the killing, but no effort was made to prove that this was the pistol found on the ground. Indeed, the inference is that it was not. This is, in substance, the testimony immediately connected with the killing. The prosecution, however, introduced a number of witnesses who proved threats made by the prisoner as far back as the month of May, and, at subsequent times, similar threats were also shown to have been made by the deceased. It was, indeed, clearly established that the parties were very hostile to each other until a short time before the killing, when it appears they became reconciled.

It further appeared that the deceased, the night before the killing, held a conversation with one Wilson; that Wilson warned the deceased against the prisoner; told deceased not to trust him; that deceased remarked that they had made friends, but that he intended to have nothing to do with the prisoner.

Again, it appeared that some time in the afternoon of the day of the killing the deceased was at the house of a brother of the prisoner, living in the immediate vicinity; that this brother, the deceased, and one Joy went to Joy's house; that the deceased drank twice, while there, of whiskey, and took away with him a bottle of it. That the deceased, Joy, and the prisoner's brother left Joy's together; that on reaching the brother's

house, the deceased was invited to remain to supper but declined, and went on to the house of the prisoner, when he was invited out, as already stated.

The jury, by their verdict, having acquitted the prisoner of murder, have in substance declared that he was not actuated by malice in committing the homicide. The effect of the verdict is to throw out of view all the antecedent menaces of the prisoner, and to put the merits of the case exclusively upon the testimony immediately connected with the killing, and, thus narrowed down, the case must be considered. The homicide being established, as well as the prisoner's agency in its commission, the law, in the absence of any proper explanation, would treat the crime as murder; or, in other words, would presume a fact; that is, that malice had prompted the party to do the deed. But as this is a legal presumption, originating in necessity, it but accords with reason that it should be indulged only while the necessity exists. As a general rule, all legal presumptions must yield to fact, or, in other words, to testimony which rebuts them. What, then, is the effect of the verdict in this case? Most clearly that the testimony outweighs the legal presumption. The law presumes murder in certain cases, but it never presumes manslaughter when the indictment is for murder, for the reason that manslaughter is a defense against a charge for murder, and can only be established by testimony. The law presumes that every man intends that which is the natural result of his acts, and if he kill another that he so intended. It never presumes that a man kills another in the heat of passion, or under the influence of great provocation; but these are facts to be established by testimony, and when so established, are held sufficient to rebut the presumption of malice, and are consequently a good defense against the charge of murder, although the party be guilty of a less crime. Legal presumptions out of the question, and looking alone to the testimony immediately connected with the killing, it is simply impossible to form any correct opinion on the subject; and if this cannot be done, how is it possible to convict a party of manslaughter in the first degree, when the crime can only be ascertained by comparing it with the facts proved? The circumstances are as strong, if not

stronger, to show that the deceased was the aggressor in the difficulty, if difficulty it can be called, than they are to implicate the prisoner. The deceased, not a day before, was warned against trusting the prisoner, and he then declared his intention to have nothing to do with him. If sincere in what he then said, why did he go to the house of the prisoner at an unseasonable hour, when visiting could not be presumed to have been his business, and manifest such anxiety to see the prisoner? The bottle of whiskey may have been provided for the very purpose of decoying the prisoner to the spring, which at that hour was a secluded spot. These presumptions, weak as they may appear, are nevertheless as strong as any presumptions, aside from the act of killing itself, which can be indulged against the prisoner. The pistol, which was found on the ground, and not shown to be the prisoner's, may have been one of the two of which the deceased was proven to have been the owner. This weapon may have been the origin of the difficulty. It is not probable that it was drawn by the prisoner; for, if so, he would probably have used it, or certainly would not have left it on the ground, especially if it could have been easily identified as his property.

The verdict, in our opinion, is not sustained by the evidence, and the judgment must, therefore, be reversed. Judgment arrested, and prisoner discharged.

EASTERLING *v.* STATE, 35 Miss. Rep., p. 210.

ILLICIT RETAILING OF INTOXICATING DRINKS.

The rule of evidence is, that when a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in showing it, the presumption of innocence or of acting according to law does not render it incumbent on the other side to prove a negative.

When there is nothing in the record to show what number of persons constituted a grand jury, and nothing to show that the persons summoned and sworn were not residents of the county, it will be presumed, in support of a judgment, that the grand jury was composed of a lawful number of lawfully qualified persons.

The foreman of a grand jury whose name was Lazarus J. Jones indorsed a bill of indictment by his signature L. J. Jones, and it appearing that he was in fact the same person, the indorsement is held sufficient.

An incomplete, defective, or void judgment at one term of the court upon a verdict of guilty may be treated as a nullity, and the proper judgment and sentence rendered and entered at the next term; and until the proper judgment and sentence shall be so made, the defendant will be regarded as continuing in custody of the law.

Error to Jasper circuit court. WATTS, J.

George L. Potter, for plaintiff in error,

Cited, Chitty's Cr. L., 283*a* and 556.

T. J. Wharton, attorney general.

HANDY, J.:

This was an indictment for retailing spirituous liquors without license.

1. A motion was made in the court below to quash the indictment on several grounds: 1st, Because the grand jury consisted of more than eighteen persons; 2d, Because it does not appear that they were residents of the county; 3d, Because the indictment is not indorsed by Lazarus J. Jones, the foreman of the grand jury, but by the name of L. J. Jones. This motion was overruled, and that is assigned for error.

As to the first ground of the motion, there is nothing in the record to show what number of persons constituted the grand jury; and it must, therefore, be presumed, in support of the judgment, that the objection was not well founded in point of fact. 2d, The indictment shows that the grand jurors were summoned and sworn to inquire in and for the body of the county, etc. In the absence of all evidence tending to show that they were not residents of the county, it must be presumed that they were duly summoned from the body of the county, and were competent to act as grand jurors. 3d, It does not appear by the record, or by any evidence, what was the name of the foreman of the grand jury; and it will therefore be presumed that the court acted properly in overruling this ground of objection. But even if true in point of fact, the objection is frivolous; for although the name of the foreman was Lazarus J. Jones, yet it was competent for him to indorse the bill under his signature of L. J. Jones, if, as appears to be conceded, he was one and the same person.

2. Upon the trial, the court instructed the jury that it did

not devolve upon the state to prove that the defendant had no license; but if he relied upon a license to excuse his selling by retail, it was for him to prove that he had the license; and refused to instruct, at the instance of the defendant, that, unless the state had proved that the defendant had no license, the verdict should be for the defendant.

These rulings were excepted, but they are clearly correct. The rule is, that when a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in showing it, the presumption of innocence, or of acting according to law, will not render incumbent on the other side to prove the negative. Roscoe's Crim. Ev., 72 (2d edit.). And where a party was convicted of selling ale without license, upon mere proof that he had sold ale, and there being no proof that he had sold without license, the conviction was sustained, on the ground that the prosecution need not prove the negative averment; because, if there was a license, it was within the knowledge and power of the defendant, and could be immediately produced; whereas, the proof could not be made by the prosecutor without inconvenience. Gening v. The State, 1 McCord, 573.

3. The case was tried at September term, 1857, and the jury returned a verdict against the defendant. The record shows that the court thereupon rendered judgment against him for —— dollars and the costs of the prosecution. At the next term the district attorney moved the court that judgment be entered against him for twenty-five dollars, and that he be imprisoned in the county jail for one week, that being the judgment of the court at the previous term, but the same not having been entered of record by the clerk. The defendant being in court in person, the court ordered the judgment to be entered accordingly. It is now objected that this is error.

After the verdict was returned, it was the duty of the court to render judgment against the defendant for the penalty prescribed by law; and until that was done, the defendant was not discharged from the custody of the law, and the jurisdiction of the court was not at an end. It is manifest here that the essential thing required by law had not been done—an award of the punishment prescribed by law for the offense; and that the ver-

dict stood at the term at which it was rendered without a judgment. The judgment purporting to be rendered was without substance, and the judgment of the law remained to be pronounced. It was therefore competent for the court, at the next term, to render judgment upon the verdict for the penalty prescribed by law. It is not the case of a judgment merely erroneous, but of one without substance, and void.

Judgment affirmed.

HAMILTON v. STATE, 35 Miss. R., 214.

LARCENY.

To constitute the offense of larceny, it is not necessary that the taking should have been *causa lucri*—it is sufficient that the taking were fraudulent and with intent to deprive the owner of his property. Review of common law authorities on this point.

Under the act of 1856, exception to the sufficiency of the proof of venue must be taken at the trial in the court below, or the point will not be available here.

Error to circuit court of Adams county. POSEY, J.

G. H. Wilcox, for plaintiff in error,

Cited, The State v. Hawkins, 8 Porter, 461.

T. J. Wharton, attorney general,

Cited, Randal v. State, 4 S. & M.; Coon v. State, 13 ib., 249.

HANDY, J.:

The plaintiff in error was indicted and convicted, in the Adams circuit court, for stealing a slave.

The evidence in support of the indictment, offered on the trial, was to the following effect:

John A. McGill testified that the slave was his property, and that he left his plantation about the 12th of March, 1856; that his overseer had given the slave a *pass* to go to St. Joseph, Louisiana, on the steamer Princess, witness being at St. Joseph at the time, but that the slave did not go there; that the ac-

cused, before the slave left, was employed by witness on his plantation as a clerk, and knew the slave; that in April following, witness received a letter from Richmond, Virginia, giving a description of a slave, then in jail there, corresponding in description with the witness' slave, and stating also that the accused had been arrested; that witness went to Richmond about the 1st of May following, and found the slave in jail there, as was also the accused; he had but very little conversation with the accused, but recollects that the accused told him that he got into a skiff with the slave above Biggs, further above the Homochitto River, or at the shanty on Old River, which shanty was in —— county; that the slave was a very smart and keen negro, and had a good deal of money about him when he left, belonging to witness.

Charles S. McAlister testified that he went to Virginia with the governor's requisition to bring the accused from the Richmond jail to Natchez; that the accused told him that he had got into the skiff with the slave at Old River; that they went to New Orleans and to Mobile, where the accused had to pay something to the custom-house; that they proceeded through the state to Richmond, Virginia; that the accused never claimed the slave to witness as his property. And this witness also testified to certain statements of officers in Virginia with reference to the arrest of the accused there; but these declarations were ruled out as hearsay evidence. This was all the evidence.

The following instructions were asked in behalf of the accused:

1st. The jury must believe, from the evidence, that the defendant did take, steal, and carry away, feloniously, the negro Warner, the property of McGill, otherwise they will find for defendant.

2d. There must be proof that the defendant's intention was to appropriate the said negro to his own use, and to deprive the owner wholly of him.

3d. All hearsay testimony is inadmissible, and the jury must not consider such in making up their verdict.

4th. If there is any reasonable doubt of the guilt of the defendant, the jury must acquit.

A verdict of guilty was returned, and a motion was made, in behalf of the prisoner, for a new trial: 1st, Because the verdict was against the law and the evidence; 2d, Because the jury did not regard the instructions of the court on the part of the defendant. This motion was overruled, and a bill of exceptions was taken, setting out the evidence and proceedings as above stated; and upon that the case is brought here.

We will proceed to consider the errors urged in behalf of the plaintiff in error.

First. It is objected that it does not appear by the record whether the court below made any disposition of the instructions asked in behalf of the accused, either granting or refusing them. These instructions must either have been granted or refused. If granted, the plaintiff in error cannot complain. If refused, it was his duty to except thereto, in order to enable him to avail himself of the objection in this court; and having taken no exceptions to the action of the court below in relation to the instructions, we cannot judicially notice the proceedings below upon that point.

But it is clear, from the motion made by the accused for a new trial, that the instructions asked in his behalf were granted. For one of the grounds of that motion is, that the jury did not regard those instructions; and this, being a part of the same bill of exceptions in which the instructions are set out, explains the silence of the previous part of the bill, and shows that the instructions were, in fact, granted. There is, therefore, nothing in this objection.

Second. It is insisted that the evidence was not sufficient to support the verdict, because there was no evidence whatever to justify the jury in finding that the offense was committed in Adams county; and, on this ground, that the new trial should have been granted.

The record does not show that the point of the insufficiency of the evidence to prove the *venue* was made in the court below; and the statute is positive and express that an objection on that point shall not be entertained in this court un-

less it appears by the record that exception was taken in the court below on the point. Acts of 1856, ch. 26. It is, however, insisted that the point must be considered as having been made in the court below, because it is embraced in the general ground of the motion for a new trial, that the *verdict was against the evidence;* the verdict being against the evidence, when there was no proof of the material fact that the offense was committed in the county in which it was charged in the indictment to have been committed. But this view is, manifestly, not reconcilable with the provisions of the statute. It expressly enumerates sundry things, necessary in the course of a criminal prosecution, which shall be presumed to have rightfully done (although the record does not show that they were done), unless it shall appear by the record that exception was taken upon the particular point in the court below; and it provides that no judgment, after verdict, shall be reversed or set aside, by reason of any such defect in the matters enumerated, unless the record shows that exception was taken upon the point in the court below. The point of the proof of *venue* is one of the matters enumerated; and it is clear that the legislature intended that no objection should be entertained in this court on that ground, unless it be shown by the record that the objection was made in the court below. The reason and policy of the statute, doubtless, were mainly to prevent the reversal of judgment in this court, by reason of clerical omissions and inaccuracies in making up records in the circuit courts, in relation to matters of such importance as to create the presumption that they were rightly done; and because of the great improbability that if they had not been done, exception would have been distinctly made on that ground. But the position taken in behalf of the plaintiff in error is in opposition both to the letter and spirit of the statute.

Thirdly. It is insisted that the evidence is altogether insufficient to establish the charge of larceny; that there is nothing tending to show a conversion, or intention to convert, the slave to the prisoner's use, and no asportation; and that the evidence merely shows that the prisoner accompanied the slave in his escape from his master, making use of the money which the slave

had for his own convenience; and, at all events, that he was merely aiding the slave in his escape from his master, without any intention of appropriating him to his own use.

There can be but little doubt, from the evidence, but that the prisoner was instrumental in taking and carrying away the slave; and it was a question to be determined by the jury, from all the facts and circumstances of the transaction, with what intention the prisoner acted. In determining that question, his conduct must be resolved upon of three hypotheses:

1st. That he was merely traveling with the slave, who was making his escape of his own accord, and without the prisoner's assistance, and making use of the slave's money as a means of traveling.

2d. That he was aiding the slave in his escape to a state where slavery was not allowed, and to that end was acting as his owner during his flight.

3d. That he was taking him away with the real intention of converting him to his own gain.

1. The first view is not sanctioned by anything in the evidence; for it is not shown that he was traveling on any business, or that he had any occasion to travel the same route which the slave took; and it is, therefore, strange that he should travel in company with the slave, giving him no assistance in making his escape, and merely for the purpose of availing himself of the money which the slave had, as a means of traveling. According to this hypothesis, he was traveling without an object, and in company with a slave, whom he knew to be making his escape from his owner. Such an explanation of his conduct is altogether improbable.

2. The evidence would have fully warranted the jury in finding that the prisoner was not merely aiding the slave in escaping to a non-slaveholding state, in order to become free there; for it appears that instead of taking him to such a state, as he might readily have done by the Mississippi river, he took him to New Orleans and Mobile, and through the heart of the slaveholding states to Virginia, the most improbable route he could have taken to get him to a non-slaveholding state.

But if he admitted that he took away the slave from his

master, intending to take him to a state where slavery was not allowed, and set him free, thereby depriving the master of him, we think that it was larceny. It was a wrongful taking and carrying away of the personal property of the master, from his possession, with a felonious intent to convert it to his own use, without the owner's consent.

The rule is now settled, that it is not necessary, to constitute larceny, that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker; and that it is sufficient if the taking be fraudulent, and with an intent wholly to deprive the owner of his property. Roscoe Crim. Ev., 533 (2d edit.), Cabbage's case; Russ. & Ry., 292 (1 Eng. C. L. Rep.); King v. Morfet, ib., 307. And it is said by the commissioners of criminal law in England, that "ulterior motive, by which the taker is influenced in depriving the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial."

This rule we consider to be in accordance with the principle on which the law of larceny rests, which is to punish the thief for wrongfully and feloniously depriving the owner of his property. The reason of the law is to secure a man's property to him; and that is to be carried out, rather by punishing the thief for feloniously depriving him of it, than for the wrongful gain he has made by the theft. The moral wrong is founded in the wrongful and felonious deprivation.

Upon this principle, if a slave be feloniously taken from his master's possession, with the intent of being removed to a state where he will become free, and the act is accomplished, the criminal intent would be as great, and the loss to the master the same, as if he were taken by the felon to parts unknown and sold for his own gain. It may, with equal propriety, be said in both cases, that the thief converts the property to his own use, so far as the loss to the master is concerned,—in the one case accomplishing his purpose of depriving the master of his property, by setting him free, and placing him beyond his reach; in the other, effecting the same end by selling the slave beyond his reach. In both cases, the moral wrong and the

invasion of private right are the same; and it makes no difference, with reference to public justice against the offender, whether he was actuated by the motive of false philanthropy, or of private gain.

A case has been cited from Alabama, decided upon a statute similar to ours, holding that the taking under these circumstances would not be larceny. State v. Hawkins, 8 Porter, 461. That case proceeds upon the view, that in order to constitute larceny, the taking must be *lucri causa;* and the well established rule above mentioned is rejected as unsound. No reason is shown in that case against the established doctrine, and we are satisfied that the rule there sanctioned is unsound in principle, and impolitic in practice.

But the court in that case, brings in aid of the rule held by it, that there was a statute of that state, as well as in other southern states, making it criminal for any to take a slave, without the consent of his owner, beyond the limits of this state, with intention to defraud or deprive the owner of the slave, in addition to the statute against stealing slaves; and hence concludes that taking a slave out of his owner's possession into another state, for the purpose of setting him free, would fall under the first statute, and not under the latter. We have a statute in this state similar to the latter. But it is manifest that this statute was intended to apply to cases of unlawful and fraudulent removal of slaves beyond the state, with the intention to defraud or deprive the owner of his property, where the taking was not clandestine and felonious; and it has no application to a case, where the taking was done with a felonious intent to make such use of the property removed as to deprive the owner of all benefit of it.

3. But the facts of the case, appearing in evidence, are sufficient to sustain the verdict, on the hypothesis that the prisoner took the slave, treating him as his own property, and for the purpose of converting him to his own gain.

The exercise of ownership is shown by his own acknowledgment, that he paid money for him at the custom-house at Mobile, and that he went with the slave to New Orleans, and to Mobile, and thence through the states to Richmond, Virginia.

If his acknowledgment, in relation to the payment of money at the custom-house, be considered as false, still it serves to show that he exercised control over the slave; and apart from this, it is in the highest degree improbable that he could have passed through all the states referred to, in company with the slave, without treating him as his property.

It is not improbable that he held out hopes of freedom to the slave; but if so, it is exceedingly improbable that he really intended to set him free, or to take him to a state where he would become free; for his conduct is altogether inconsistent with such a purpose. Instead of taking a course reconcilable with such an intention, he took a directly contrary direction, to the city of Richmond, well known as a large slave mart, and where he might very probably be able to sell him beyond the reach of detection or pursuit.

These circumstances were sufficient to warrant the jury in finding that he took the slave away for the purpose of selling him. The question of intention was fairly submitted to them by the instructions, and it was their province to determine, from all the circumstances, whether the taking was with this intention. If their verdict was found under the belief that the prisoner took the slave, either with this intention, or with that of taking him to a non-slaveholding state, in order that he might become free, the evidence is sufficient to sustain the verdict.

Judgment affirmed.

GAMBLE *v.* STATE, 35 Miss. R., 222.

GAMING.

An indictment for betting on the result of an election of presidential electors in a certain state, is not sustained by proof of a bet on the result of the presidential election in that state.

Error to Warren circuit court. YERGER, J.

Marshall and *Miller*, for plaintiff in error.

T. J. Wharton, attorney general.

Smith, C. J.:

This was a conviction in the circuit court of Warren, under the statute against gaming. A motion was made for a new trial, upon the ground, amongst others, that the verdict was against the evidence. The motion was overruled. The judgment on the motion is assigned for error, and presents the only question necessary to be noticed.

The indictment charged that the plaintiff in error bet money on the result of an election to be held on the 4th day of November, 1856, for eight electors in the state of Maryland, to vote for President and Vice-President of the United States.

The only witness introduced on the trial testified that in 1856 he bet with the defendant one hundred dollars on the result of the election in Maryland in 1856, between Mr. Buchanan and Mr. Fillmore, for President of the United States; that he bet the state would vote for Mr. Fillmore, and the defendant bet it would vote for Mr. Buchanan; and that nothing was said, nor any bet made, about the election of electors.

The voting for, or election of President and Vice-President, is entirely distinct from the election of the electors. They are held at different times and different places, which are designated by law. It does not, therefore, admit of question that the charge in the indictment was not sustained by the evidence; consequently, that the verdict should have been set aside and a new trial awarded, which we order to be done.

McGuire v. State, 35 Miss. R., 366.

Misdemeanor.

The court has no power to amend an indictment as to matter of substance without the concurrence of the grand jury by whom it was found, though amendments as to mere informalities may be made by the court. 1 Chitty Cr. Law, 297.

In indictments for misdemeanors, if a demurrer be sustained to the defendant's plea in abatement, the judgment is *respondeat ouster*.

Error to La Fayette circuit court. Scruggs, J.

J. F. Cushman, for plaintiff in error,

Cited, Franklin v. Tallmadge, 5 Johns., 85; State v. Hughes, 1 Swann, 261; 2 Carter, 305.

T. J. Wharton, attorney general.

Handy, J.:

In this case the defendant below pleaded in abatement to the indictment, that the grand jury which found the bill was illegally organized, and that his name was *Michael* J. McGuire, and not *Mitchell* J. McGuire, as stated in the indictment. To the first ground of objection stated in the plea, the state replied, traversing the allegations; and as to the misnomer, moved the court to strike out the name of *Mitchell* and insert Michael in place of it, which motion was granted, and the indictment amended accordingly. The defendant demurred to the replication, and the demurrer was overruled; and thereupon he asked leave to plead *not guilty* to the indictment, which was refused, and judgment final was rendered against him.

The action of the court was manifestly erroneous in two respects.

1st. In permitting the indictment to be amended by striking out the name contained in it and inserting the name of the defendant. It is well settled that the court has no power to amend an indictment as to matter of substance without the concurrence of the grand jury by whom it was found, though amendments as to mere informalities may be made by the court.[1] 1 Chitty's Crim. Law, 297.

2d. It was error not to permit a plea to the merits after the demurrer was overruled. Although the judgment in an indictment for a misdemeanor, upon issue to the defendant's plea in abatement, or upon issue taken by him to the replication, and verdict against him, is final, yet if a demurrer to the plea be sustained, or his demurrer to the replication be overruled, the judgment is *respondeat ouster*. 3 Chitty's Crim. Law, 451.

The judgment must therefore be reversed, and for the first error the indictment is quashed.

[1] Archbold Cr. Pr. & Pl., 100, 401, *et seq.*; U. S. v. Kinman, 1 Baldwin, 292; Burr., 25, 27; 6 Mod., 268; 1 Sid., 244; 1 Keb., 252; 1 Hawk., c. 25, § 97; 1 Salk., 51; 1 Stark. Cr. Pl., 245; Cro. Jac., 502, 529; Keb., 900; 8 Coke, 310; 1 Lev., 189; 3 ib., 430; 3 Mod., 167; Cro. Car., 144; Palm., 480: 2 Strob., 843; 2 Ld. Raymond, 1518.

CHARTER *v.* STATE, 36 Miss. R., 75.

GAMING.

All existing acts against gaming were repealed by the code, and ceased to operate on the first of November, 1857, except as to prosecutions then pending. Rev. Code of 1857, 43, art. 2.

Upon a conviction of gaming, after the revised code went into operation, under an indictment found and returned before that time, the district attorney is entitled to a fee of ten dollars only, and not to the fee allowed by the code.

Error to Yallobusa circuit court. COTHRAN, J.

J. Z. George, for plaintiff in error.

T. J. Wharton, attorney general.

SMITH, C. J.

The plaintiff in error was convicted at the November term, 1857, upon a charge for gaming, and was ordered into custody until the fine imposed and the costs of the prosecution were paid. Subsequently he moved for a discharge upon the ground that he had fully paid off the said fine and costs. The motion was overruled, and a bill of exception, setting out the facts, was filed. From which it appears that the indictment under which the conviction was had, was found at the April term of the court in 1857, and, of course, before the revised code went into operation; and that the conviction did not take place until after the day appointed for it to take effect; that the plaintiff in error had paid all the costs of the prosecution, and ten dollars as the tax fee, to which the district attorney would be entitled, if the case was to be governed by the provision of the revised code in relation to the tax fee of the district attorney in such cases.

All the existing acts for the prevention of gaming were the subject of revision, and were, therefore, repealed by the code, and ceased to operate on the first of November, 1857, when it went into operation (Rev. Code, p. 43, chap. 1, art. 2), except as to prosecutions then pending and undecided. In such cases the law which applied when the indictment was found was continued in force, and governed the prosecution, in regard to

the nature and definition of the offense. It also controlled as to the punishment attached to the offense charged, unless when a milder punishment was provided by the code. In such case the mitigated punishment is to be applied instead of the severer one prescribed by the previous law. Rev. Code, 44, ch. 1, art. 6.

It is, therefore, true, as contended by the attorney general, that although the trial occurred after the revised code went into operation, the conviction was had under the law which existed when the indictment was found. But this can have no effect upon the question whether the motion was correctly or incorrectly overruled, unless it is made further to appear that the 9th section of the act of 1839 was not repealed by the revised code. If it was not repealed, there was no error in the action of the court, as the district attorney was entitled to a tax fee of fifty dollars. But it is certain that the provisions of the 9th section of said act were the subject of revision, and were, therefore, repealed by the code, under which the district attorney is allowed for convictions, under the statute against gaming, a tax fee of only ten dollars. It follows, hence, that no fee should have been taken, unless the provisions of the revised code regulated the question of costs. Of this there can be no doubt. In either event the judgment below was erroneous, and it is ordered to be reversed, and that the judgment which should have been rendered in the circuit court be entered in this.

MASK v. STATE, 36 Miss. R. 77.

HOMICIDE.

In questions respecting the character of witnesses, the doctrine respecting *ante litem* and *post litem motam* is in no way applicable. The jury were instructed that "If the act producing death be such as is ordinarily attended with dangerous consequences, as by the use of a deadly weapon, or be committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation be shown; for the inference is that the natural or palpable effects of any acts deliberately done were intended by the agent." *Held* to have been properly given.

Though one of several instructions, taken by itself, may have been erroneous, yet, if taken in connection with all the others, the law be, on the whole, correctly expounded, the judgment will not be reversed.

The circuit judges have a right, in proper cases, to modify instructions asked.

Error to Marshall county circuit court. SCRUGGS, J.

The plaintiff was convicted a second time, in the court below, of the murder of Susan Elizabeth Smith, the first verdict having been set aside by this court. See 32 Miss. R., 405.

The following is the substance of the evidence:

For the State.—William Smith is a brother of the deceased, who was about sixteen years of age at the time she was killed. On the 26th of April, 1856, between three and four o'clock in the evening, the prisoner, James Mask, his brother, and Thomas and Henry Wooley, his brothers-in-law, came to witness' father's house, and stopped at the gate in front; deceased, who, with her sister Sarah Jane, had just started to the spring for water, informed witness that there were some men at the gate, who wanted to see him; witness went out and saw the above-named parties there; witness spoke to them, and asked them to get down; the two Masks were near the gate on their mules, and the two Wooleys were a "little piece off;" they asked for witness' father, and witness sent his little brother, who was with him, to tell his father to come out; witness' sisters passed out of the gate to the spring, and the prisoner reined his mule out of the way to let them pass, and said "Good evening" to them; witness' father then came out, and James Mask said he wanted to speak to him; witness' father and Mask went aside, about fifteen paces, witness' father on the inside, and Mask on the outside of the fence; the prisoner asked witness to come outside of the gate, saying he wanted to speak to him; witness replied he could talk as well where he was; the prisoner then got down from his mule, and threw the bridle-reins over the gate-post, and said: "I understand you said, or swore, you saw me take corn out of that crib;" witness replied that "he did;" prisoner immediately presented a pistol at witness, and fired, shooting witness in the left jaw; witness turned his right side to the prisoner, who fired again, striking him in the right arm; the prisoner fired a third time at witness, but missed him; wit-

ness' sister Sarah was then about twenty yards from the gate; the deceased was nearer; deceased said to prisoner: "You had better get away from here;" prisoner then immediately wheeled and shot her; witness saw deceased and prisoner at the time; she was about eight yards from the gate, and had a bucket on her arm; "prisoner seemed in the act of alighting, as though he had sprung towards her;" "he threw his pistol over, touching the tail of her bonnet, and fired; the ball struck her about half way between the left nipple and point of her shoulder, and she died in a few minutes;" witness did not see the Wooleys do anything, and as soon as prisoner shot deceased, he ran off; witness had no pistol or other weapon about him at the time of the shooting, but immediately afterwards he went into the house and got a gun, and came out with it, and met Ricketts and others bringing the deceased to the house; witness did not shoot, or use the gun in any way.

The wounds made on witness were small, and made by turkey-shot; he was about a yard and a half from prisoner when he shot him; witness' face was powder-burnt; witness saw his sister after she was killed; did not notice the size of the wound, but noticed that her dress was powder-smoked.

R. J. Smith is the father of the deceased; the witness corroborates Wm. Smith until the point where he went aside with James Mask, except that he did not hear what had passed between Wm. Smith and the other parties before witness came out of the house. He further stated that after he and James Mask had gone aside, the latter asked him "if he had ever said he saw Pleasant Mask stealing corn?" and pointing back to him, said, "that was a brother of his;" witness replied that he had not said so, and told him what he had stated before the magistrate; witness heard the firing on his son, and left James Mask and went towards his son; witness heard deceased tell prisoner "he had better be leaving there;" he immediately wheeled round and shot her; he either run or jumped to her; the tail of deceased's bonnet was long, and hung low down on her person, and prisoner's pistol caught in it as it fired; as prisoner approached her, he pushed the pistol towards her, and he thinks the muzzle touched her bonnet; witness' two daughters were

screaming at the time the shooting was going on; witness saw none of the other parties (J. Mask and the Wooleys) do anything; William did not get the gun until after deceased was shot; witness does not know whether deceased's clothing was burnt or not.

Sarah Jane Smith is a sister of deceased; she saw the four men (Masks and Wooleys) ride up to the gate; they asked witness and deceased, who were in the yard, having started to the spring, "if their brother was at home?" they told them he was; they then said, "Tell him to come out;" deceased went back and told her brother; deceased and witness went out of the gate on their way to the spring; soon heard firing; prisoner shot her brother first; he fired three times, and then shot her sister; witness was twenty-five or thirty yards from the gate when the firing commenced; prisoner, after shooting her brother, turned round and jumped two or three steps towards deceased; he put the pistol close to her—seemed to be right at her, and fired; he then ran off down the hill towards the spring, close by witness; witness saw the pistol when deceased was shot, and thought it was nearly touching deceased; she did not see the pistol catch in deceased's bonnet; she did not hear deceased say anything to prisoner before he shot; prisoner stopped a short time when he shot deceased; he then came on by witness, running down the hill, with the pistol in his hand; the several firings of the pistol were in very quick succession.

All of the foregoing witnesses concur in the statement that the Wooleys did not leave until after deceased was shot, and that they were in a position to see the shooting.

Reuben Ricketts stated that he did not come out of the house until the firing was over; when he came out, he saw three of the parties running off, one on foot, and the other two on mules; witness went down where deceased was, and as he went back to the house with deceased, he met William Smith with a gun; deceased said she was shot, and must die; she died in a few minutes afterwards; the firing was in quick succession; did not observe any difference in time between the reports.

H. D. Wilson was one of the company who arrested prisoner

in Tippah county, in May, after deceased was killed; witness was not among the first who went to the house where prisoner was, but came up after the prisoner had been arrested and brought out; William Spillers, William J. Smith, and Mr. Julian were along in company; when witness went up to where prisoner was, he asked prisoner to give up his arms, if he had any; told him if he resisted he would shoot him; prisoner said he had no arms, and gave up an old broken-back spring-knife that he had; afterwards prisoner was sitting on the ground, and the company was standing round, and witness squatted down by prisoner, and asked him if he killed the woman; prisoner said "he did, but was very sorry for it;" witness then asked prisoner if he shot William Smith; prisoner said, "Yes; and, damn him, if it was to do over again, he would do it again."

Cross-examined.—Witness first mentioned the conversation to Mr. Julian, the next day, on their way to Holly Springs; witness never said this conversation took place at De Shong's store; witness was summoned on the former trial, but was not examined then; he did not communicate this conversation to any one of them.

William J. Smith.—Witness is not related to the deceased; he had a conversation with prisoner after his arrest, and when they were bringing him to the jail; if any of the rest of the company was near, it was William Spillers, and witness don't recollect that Spillers was present; witness asked prisoner if he killed Miss Smith; he replied that "he did, and did not know why he did it;" witness then asked him if he shot William Smith; and he said, "Yes; and that he did it because he swore against him in court; and that he went there with the intention to kill William Smith, and would do so again, if it was to do over again."

On Saturday before the killing, witness, prisoner, and old man Wooley were together, and prisoner said, "If any man came in court and swore he stole corn from Mr. Norris, he would put the contents of that into him," at the same time pulling out a revolver.

Cross-examined.—Don't know to whom he first mentioned the above confession of prisoner; thinks he did not mention it

until after the trial at court; he did not want to be a witness against the prisoner.

For the defendant.—Julian.—Was one of the men who went to arrest prisoner; the question was asked him, why he killed the woman; he said "he did it accidentally;" witness told him "not to say that any more, as any one in broad daylight could have known it was a woman;" prisoner hushed, and said no more; witness don't know who asked the question, or whether witness Wilson was present or not; witness was not one of the first who came up after prisoner was arrested; Wilson came up after witness did; witness was present all the time after Wilson came up; when Wilson came to where the prisoner was, the latter had his knife in his hand, "whittling;" Wilson said to him, "Don't draw your knife on me, or I will shoot you;" the conversation with prisoner, as related by witness, occurred before this circumstance; witness don't recollect of hearing prisoner tell Wilson anything about killing the woman, nor to have noticed Wilson squat down by him; last year (the trial took place in October, 1857) Wilson told witness something about what prisoner said to him; witness can't recollect exactly how Wilson told it, but thinks he said "prisoner told him he killed the woman, but did not go to do it; thought she was a man rushing on him;" but witness can't say certainly that was the way Wilson told it.

Cross-examined.—Witness knows Wilson, and believes him to be a man of truth, and would believe him on oath.

Thomas Wooley.—Witness, prisoner, Henry Wooley, and James Mask rode up to Smith's, and halloed; William Smith came out; told him he "wanted nothing to do with him, wanted to see the old man;" the old man came out, and James Mask rode up to the house some twenty steps, to talk with him; William Smith came up to the gate, and said to the prisoner, "What have you come here for, you d—d thief?" prisoner replied, "Don't call me a thief, or I'll shoot you; and that he did not come here to be called a thief, and would not allow it;" William Smith called him a thief again; he also drew his knife, and said he would stab prisoner; prisoner then shot him; he shot three times, and then immediately wheeled round and went off

down the hill; he made no stops at all; James Mask had a pistol and a stick with him; prisoner had a pistol, which witness saw loaded that morning with turkey-shot, one in each barrel; Henry Wooley had a rifle-gun.

Cross-examined.—Witness is a brother of prisoner's wife; saw the pistol loaded at prisoner's house; don't know why it was loaded; did not hear prisoner say why he loaded it; witness went to prisoner's house the night before, to show James Mask the way there, as he had just come into the neighborhood; witness, prisoner, and James Mask went that morning to prisoner's father's; they had no conversation or understanding about the Smiths; they met with Henry Wooley at his father's; witness was not with prisoner all that day; prisoner went to a store, and stayed there awhile, and then came back to witness' father's, and after dinner started to Smith's, to make a compromise about the matter between them; James Mask halloed when they got to Smith's, and William Smith came out; witness did not see the girls then; William Smith called his father out; witness did not see a little boy go after him; witness saw the girls pass out of the gate; defendant was some ten or twelve steps from the gate, and got out of their way, and spoke to them; witness did not hear prisoner ask William Smith to come outside, that he wanted to talk to him; prisoner got off his mule when William Smith called him a thief, and said he would shoot him if he called him so again; William Smith then drew his knife; it was a large one, with a long blade and keen point; witness did not see prisoner shoot deceased; he heard no other reports but the three shots fired at William; witness was on his mule, a short distance off, and looking back; don't know who shot deceased.

Mrs. Catherine Terrill.—Saw deceased after her death; saw her clothes, "but not good;" saw her bonnet, and thinks the one in the court is the same; saw no sign of burn about it, and sees none now; saw the wound on Miss Smith, and thinks it was some larger than the one on William Smith.

R. L. Walker.—Saw deceased next morning after she was shot; saw the wound, but did not examine it minutely, and thinks it was as large as would have been made by a rifle-ball of

the size of 80 to 100 to a pound; don't think a turkey-shot could have made it; saw no powder-burns about deceased's clothing that he recollected.

Cross-examined.—Knows Thomas Wooley; has heard his character for truth and veracity spoken of; the general opinion is unfavorable to it; it would depend on circumstances whether witness would believe him on oath; never heard Wooley's character spoken of until after the shooting of Miss Smith.

The testimony of witness, on cross-examination, was objected to, for the reasons stated in the opinion of the court.

Miss E. Wooley.—Witness is a sister of prisoner's wife; was at prisoner's house on the morning of the killing; saw him load his pistol; it was a revolver, had six barrels, and each was loaded with one shot; she went with the "parties" to her father's; they stayed there until after dinner, when they left; the Masks said "they were going up to see about things, and would be back that night;" Pleasant and James Mask, and her brothers, started to Pleasant Mask's, to secure the house; they came back and stayed that night; Pleasant and James started for home next morning, but came back before reaching home, and left; her brother Henry left the country; he did not go with the Masks; had a rifle when he went away; it was loaded; he has not been back since.

Cross-examined.—Heard them say nothing about going to Smith's, and heard them threaten no one; paper was put on the shot in the pistol.

Dr. Robinson examined William Smith's wounds, and proves that they were small, and made by turkey-shot; and that his face was somewhat powder-burnt; did not see deceased; thinks pistol held within six inches would make a larger hole than if held six feet off.

Aaron Woodruff stated, if the muzzle of the pistol was entangled in the bonnet when it was fired, it would have burnt the bonnet some, and left some mark; "does not think that shot of size shown (turkey-shot) could make a hole as large as the one shown in dress of deceased;" a pistol fired will throw powder further in the face than it would burn clothing; pistol fired near dress of the kind shown witness (dress of deceased) would be apt

to carry the dress into the wound, and make it somewhat larger. The bonnet of deceased was shown witness, being a light, thin cotton one, and witness thought that a pistol fired while touching it would be almost certain to burn it; and

John Trousdale, another witness, was of the same opinion.

Several witnesses were then called for the state, who agreed that Thomas Wooley's character for veracity was bad, and stated that they would not believe him on oath; one of these, Blackard, stated, however, that he had never heard his character questioned until after the killing of Miss Smith. This testimony was objected to for reasons stated in the opinion of the court.

This was all the evidence.

The court, at the instance of the district attorney, instructed the jury as follows:

1. If the jury believe, from the evidence, that the defendant went to the house of R. J. Smith with intent to kill, or to commit some felony upon him or William Smith, or both, and that whilst there engaged in carrying out such intention, defendant shot and killed Susan Elizabeth Smith, the jury will find him guilty of murder.

2. Murder is the unlawful killing of a human being, in the peace of the state, with malice aforethought, or premeditated design, which is the same thing. Malice is either express or implied in law; express malice is where one person kills another with a sedate, deliberate mind, and formed design; such formed design being evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. And malice is implied by law from any deliberate, cruel act, committed by one person against another, however sudden.

3. If the act producing death be such as is ordinarily attended with dangerous consequences, as by the use of a deadly weapon, or be committed deliberately, the malice will be presumed unless some sufficient cause or provocation should be shown; for the law infers that the natural or probable effects of any act deliberately done were intended by the agent.

4. If the jury believe, from the evidence, that defendant shot

deceased with a deadly weapon and killed her, the law infers malice in the absence of proof showing the contrary; and unless the evidence shows something to excuse or mitigate the act, the jury will find him guilty of murder.

5. Every man is to be taken to intend that which he does, or which is the immediate or necessary consequence of his act. A mortal wound, given with a deadly weapon in the previous possession of the slayer, without any or upon very slight provocation, is *prima facie* wilful and premeditated killing, and in the absence of further excuse or explanation, is murder.

6. No affront by base words or gestures, however false or malicious, and aggravated with the most provoking circumstances, will free the party from the guilt of murder. If, therefore, the jury believe from the evidence that the defendant, for mere affront by words uttered at the time of killing, or at any other time of killing, or at any time, by deceased, or by any other person, unlawfully killed deceased with a deadly weapon, they will find him guilty of murder.

7. If the jury believe, from the testimony, that the defendant was endeavoring to kill William Smith, or commit a felony upon him, and killed in that attempt the deceased, either accidentally or wilfully, they will find him guilty of murder.

The following instructions were given, as asked by the prisoner:

1. If the jury have any reasonable doubt, from the testimony, that the prisoner is guilty of murder, they may acquit him of murder and find him guilty of manslaughter.

3. In all criminal cases whatever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for this purpose, unless it generates the full belief of the fact, to the exclusion of every reasonable doubt.

4. In a charge of murder, the guilt to be established is not the killing only, but also the killing with premeditated design to effect the death of any human being; and the evidence must generate the full belief of the fact, to the exclusion of every rea-

sonable doubt, or the jury cannot find the defendant guilty of murder.

5. If the jury believe the defendant killed the deceased without a design to effect death, in a heat of passion, but in a cruel and unusual manner, such killing will not be murder, but manslaughter.

6. The law presumes malice from the use of a deadly weapon, but this presumption may be rebutted by proof from the circumstances under which the weapon is used.

7. The law presumes every man innocent until his guilt is established; and it devolves upon the state, in the present case, to prove the defendant guilty of murder, to the exclusion of all reasonable doubt from the minds of the jury, or they must acquit.

8. If the jury believe, from the evidence, that the defendant took the life of Susan Elizabeth Smith, but the act was committed in a sudden transport of passion, and without malice, then the said defendant cannot be convicted of murder, but only of manslaughter.

11. If the jury believe, from the testimony, that the confessions were made from fear, threats, or hope of benefit, such confessions do not warrant a verdict of guilty.

13. The killing a human being without a design to effect death, in a heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, is manslaughter only, and not murder.

14. If the jury believe, from the evidence, that the deceased was shot by some other person than the defendant, he cannot be held responsible for the act, unless they further believe from the testimony that such killing was effected by some one jointly engaged with the defendant in the commission of a felony, and that such killing was done strictly in prosecution of the purpose for which the party was assembled.

The court refused to give the following instructions as asked by the prisoner, but gave them with the subjoined modifications, made by the judge.

"2. If the jury from the whole body of the evidence are con-

vinced of the killing by defendant, but are not convinced beyond reasonable doubt that it was done with malice, they cannot find the defendant guilty of murder, but may find him guilty of manslaughter."

The judge modified this as follows: "By killing with malice is meant not through hatred or revenge, but a killing with intent to kill, and without lawful excuse; and such malice is presumed when the killing is done with a deadly weapon, and without lawful excuse."

"9. If the jury believe from the evidence that the defendant went to the premises of R. J. Smith with the intention of committing a felony, and after this intention was consummated he accidentally shot and killed the deceased, they cannot find him guilty as charged."

The judge modified the 9th charge as follows: "Unless the accidental killing happened so nearly in connection with the execution of the original design, as to constitute one continuous transaction; in that event it would be unlawful killing, in the perpetration of felony, and would be murder."

"10. It is essential to the conviction of the accused that all the facts of the case, and all the testimony introduced, should be entirely consistent with the hypothesis of his guilt, and all the circumstances should be of a conclusive nature and tendency; and unless the jury believe from the testimony that the circumstances tend to show beyond a reasonable doubt that the defendant killed the deceased, and that the killing was with a premeditated design to effect death, they cannot find the defendant guilty of murder."

Which was modified as follows: "That is, the body of the proof must be of conclusive character, and must lead to the conclusion of his guilt to the exclusion of all reasonable doubt."

"12. If the jury believe from the evidence that the defendant had gone to the house of the prosecutor with the intention of committing a felony on William Smith, and after such intention had ceased, and while defendant was fleeing, he shot and killed deceased, upon sudden heat of passion, and without the premeditated design to effect death, he is guilty of manslaughter only, and not of murder."

Which was modified as follows: "Unless, as already stated in explanation of defendant's 9th charge, the killing took place so nearly in connection with the commission of the felony upon the person of William Smith, as to constitute one continuous transaction; in that event the killing would be properly considered as having happened in the attempt to perpetrate a felony, and would be murder."

"15. Confessions of the accused in capital cases are the weakest species of evidence, and must all be taken together, as well those which make in favor of the prisoner as those which make against him."

Modification by the court: "The confessions of the defendant are to be taken altogether, it is true, but the jury are not bound to credit them all, but may treat them as other evidence, crediting all or none, or crediting a part and disobeying a part, as in their judgment is right and according to the truth."

The jury found the defendant guilty of murder.

He moved for a new trial: 1. Because the verdict is contrary to law and the evidence. 2. The court gave improper instructions for the state. 3. The court refused proper instructions asked by defendants, and made improper modifications of them. 4. The court refused to continue the case. And, 5. The court suffered improper evidence to go to the jury.

This motion was overruled, and sentence of death pronounced; and the defendant sued out this writ of error.

H. W. Walter and *J. W. Clapp*, for plaintiff in error,

Cited, 1 Russ. on Cr., 423; McDaniel v. State, 8 S. & M., 401; Cotton v. State, 31 Miss. R., 401; 1 Stark. Ev., 182, 183.

T. J. Wharton, attorney general,

Cited, Philips v. Kingsfield, 19 Maine R., 375; 2 Russ. on Cr., 539 and 869; 4 Black. Com., 200; 4 Mass R., 396; State v. Zellers, 2 Halstead R., 220; 2 Stark. Ev., 524; 4 S. & M., 118; Bolls' case, 9 ib., 284; Cicely's case, 13 ib., 210; Green's case, 28 ib., 688; Jolly's case, 13 S. & M.; McCann's case, ib. 497; Wharton's Crim. Law, 2d edit., 378.

HARRIS, J.:

The plaintiff in error was convicted upon an indictment for murder in the circuit court of Marshall county. This writ of error is prosecuted to reverse the judgment pronounced on that conviction. Six causes of error are assigned. We shall, however, notice those only which are relied on in the briefs of counsel and in the argument of the case, the others having been waived, by agreement, as not being sustainable.

The first ground of error relied on is, that the court erred in permitting Walker and Blackard to answer the questions in relation to the character of Thomas Wooley for truth and veracity, and permitting said answers to go to the jury as evidence.

It is contended that these witnesses never heard the character of Wooley for truth and veracity called into question until after the killing; their testimony to impeach his character should have been rejected, on the principle *post litem motam*, applicable to *hearsay* evidence, even when otherwise admissible.

This is certainly a novel application of the rule, as well as a misconception of the reasons on which it was founded.

The doctrine of *ante litem motam*, or that evidence of reputation or common fame, must be confined to declarations "*made before any controversy arose*," is a qualification of *this* exception to the general rule of excluding hearsay evidence, to wit: that in matters of public and general interest, evidence of common reputation is admissible. The ground on which such evidence is admitted is, that the declarations offered are the natural effusions of one who knows the truth, and speaks under circumstances wholly devoid of temptation to falsify it. 1 Greenleaf Ev., chap. 6, §§ 127, 131; Whitlock v. Baker, 13 Ves., 514; Rex v. Cotton, 3 Campbell, 444–446.

Formerly the rule was limited to declarations made before the *commencement of the suit*. The latter and better doctrine is, that to avoid the mischiefs which might otherwise result, all *ex parte* declarations, even though made upon oath, referring to the beginning of the *controversy*, are to be rejected.

The *lis mota* here referred to has relation to the *principle subject in controversy*, before the commencement of the suit, and *in issue on the trial*, where the evidence is sought to be intro-

duced, and not to *collateral* and *incidental questions*, arising in the progress of the trial, for the first time, as a matter of controversy.

To prove that a witness is a man of bad character among his neighbors *generally*, that by *common reputation* he is devoid of truth, does not prove that there ever had been a *controversy* or dispute on that subject, but rather the contrary; that it was a subject of public and general agreement among his neighbors about which there was no controversy; and the force of such testimony to discredit a witness must always depend on the extent of this general agreement. These facts are always elicited, or not, at the discretion of the counsel, before the jury; and in proportion as the matter of character is settled or controverted in his neighborhood, will the jury attach importance to the opinion of the witness called to discredit him.

In the sense of our law, therefore, says Mr. Greenleaf, "The *lis mota* carries with it the further idea of a *controversy upon the same particular subject in issue.* For, if the matter under discussion at the trial, was not in controversy at the time to which the declarations offered in evidence relate, they are admissible, notwithstanding a controversy did then exist upon some other branch of the same general subject."

Where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and consequently the objection does not apply. See 1 Greenleaf's Ev., § 132.

We conclude, therefore, that there is no error in this assignment. It is next insisted, on the part of counsel for plaintiff in error, that the court erred in giving the third charge asked on the part of the state, as follows:

"If the act producing death be such as is ordinarily attended with dangerous consequences, as by the use of a deadly weapon, or be committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation should be shown. For the law infers that the probable effects of any act deliberately done, were intended by the agent."

It is objected to this charge, that it does not contain the qualification that the malice may be rebutted as well by the

evidence as produced against the defendant, as by his own testimony, and the case of McDaniel against the State, in 8 S. & M., is cited as an authority in point. The charge held erroneous in that case was this: "Every homicide is presumed to be committed with malice aforethought, and it devolves on *the prisoner* to prove the circumstances which excuse the act." The court held that the jury should not have been limited in their investigation to the evidence produced by the prisoner alone, but they should have been instructed to look to the whole evidence, both that against him as well as for him, for circumstances of justification or of excuse for the act. In the case before us no such limitation occurs, but the instruction strictly conforms to the ruling of the case cited from the court.

The third cause of error insisted on, is the giving the seventh instruction asked by the state, to the following effect: "If the jury believe from the testimony that the defendant was endeavoring to kill William Smith or commit a felony upon him, and killed, in that attempt, the deceased, either accidentally or wilfully, they will find him guilty of murder." And it is upon this assignment that counsel mainly rely in their argument for a reversal of the cause. It is urged with much zeal and ingenuity that the charge, as asked and given, precluded the jury from all inquiry into the circumstances of alleviation, justification, or excuse, that may have existed, and induced the attempt to kill William Smith, and the accidental killing of deceased, and required them to return a verdict of guilty of murder, notwithstanding they may have been satisfied from the evidence, that in such attempt the defendant was acting in self-defense.

To this view of the instruction objected to, several answers occur to us, either of which is deemed conclusive on this assignment.

First. "It is the settled rule of this court, that all the instructions given by the circuit court on the trial of a cause, must be construed together; and if, when all taken together, the law be correctly given, the judgment will not be reversed because a single instruction, taken by itself, might be too broad in its terms." Childress v. Ford, 10 S. & M., 25.

Taking this rule as a guide, and placing the seventh instruction for the state and the fourth instruction for the defendant together, to explain and make it more intelligible, as it was doubtless intended, let us see whether it was possible for the jury to have misunderstood its meaning.

Seventh. "If the jury believe, from the testimony, that the defendant was endeavoring to kill William Smith or commit a felony upon him, and killed in that attempt the deceased, either accidentally or wilfully, they will find him guilty of murder."

Fourth. "In a charge of murder, the guilt to be established is not the killing only, but also the killing with premeditated design to effect the death of any human being, and the evidence must generate the full belief of the fact, to the exclusion of all reasonable doubt, or the jury cannot find the defendant guilty of murder."

Add to this the fifth instruction for defendant: "5. If the jury believe from the evidence that the defendant killed the deceased without a design to effect death, in a heat of passion, but in a cruel and unusual manner, such killing would not be murder, but manslaughter." And the thirteenth instruction for defendant, as follows: "13th. The killing of a human being in the heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, is manslaughter only, and not murder." Taking these instructions altogether, this assignment is wholly untenable.

The fourth instruction informed the jury that, to constitute murder there must have been premeditated design to effect the death of some human being.

The fifth instruction informed them, that if the killing was without design to effect death, but in the heat of passion, and in a cruel and unusual manner, that such killing would only be manslaughter.

And the thirteenth instruction informed them, that under the last-named state of facts, the defendant would not be guilty of manslaughter even, if such killing was committed under circumstances constituting excusable or justifiable homicide.

These, with other instructions in the record, left the jury untrameled to consider the defendant's case, and to decide it according to the facts and circumstances in proof before them.

Again, the precise point here presented has been determined by this court in Cotton v. State, 31 Miss. R., 504. In this case the following instruction was asked and given for the state: "If the jury believe, from the evidence, that the accused killed the deceased, and no accompanying circumstances appear in the evidence to *excuse* the act, the law presumes the killing was done maliciously, and they will find him guilty of murder."

The same argument was made for reversal upon this instruction as now presented to us, to wit: That the instruction limited the investigation of the jury to the crime of murder, or to the defense of excusable homicide, and that they were not permitted to take into consideration the defense of manslaughter.

The court, in answer to this objection and argument, says: "Our conclusion upon the point is, that the instruction was wholly unnecessary; that it did not in the least influence the jury, and we should not, therefore, reverse the judgment on this ground."

But again: The cases are numerous, not only in this court, but elsewhere, extending both to civil and criminal cases, that "where the judgment of the court below is *clearly* right, the High Court of Errors and Appeals will not be warranted in reversing it because the instructions asked were erroneously given or refused." McLanahan v. Barrow, 27 Miss. R., 664; State v. Cotton, 31 Miss. R., 504; Brantley v. Carter, 26 Miss. R., 282; Cantzon v. Dorr, 27 Miss. R., 245; Hill v. Calvin, 4 How. R., 231; Baynton v. Furnall, 4 S. & M., 193; Wilkinson v. Griswold, 12 S. & M. 669; Wiggins v. McGimpsey, 13 S. & M., 532.

Wharton says: "If an error be immaterial and irrelevant, and justice has been done, the court will not set aside the verdict, nor enter into a discussion of the question of law." American Criminal Law, § 3060, 4th revised edition, citing very many authorities, ancient and modern, English and American, for the rule.

Considered in reference to this reasonable rule, the assignment of error under consideration seems to be wholly without

force. There is not only no testimony to support the defense attempted to be insinuated, that the deceased was killed by the defendant accidentally, while attempting to kill her brother, but the proof is overwhelming, both from his own confession and other testimony, that the suggestion is utterly untrue.

The testimony shows that the killing was not accidental, but intentional; that instead of its being connected with the act of shooting at William Smith, or endeavoring to kill him, it was after defendant had left him, and was going from him, that he met and killed deceased.

The instruction was, therefore, unsupported by any evidence whatever; and taken alone, even if it were so erroneous, in the language of the court in the case of The State v. Cotton, "did not in the least influence the jury, and we should not, therefore, reverse the judgment in error."

The next error insisted on in argument is, that it erred in modifying several instructions asked by the defendant, which, without such modifications, stated the law correctly, and this argument is more directed to the general impolicy of such a practice than to any erroneous charge made by the modifications complained of. Indeed, on examination of these several charges, with their respective modifications, as given by the court, we are satisfied that they stated the law correctly. In Boles v. The State, this court has said that, "in criminal trials, the circuit judge is not bound to give or refuse the instructions asked by counsel on either side in the precise terms in which they were framed. He may modify the charges asked on both sides, so as to make them conformable to his own views of the law." 9 S. & M., 284; Green v. The State, 28 Miss. R., p. 687.

It is, therefore, not only the right but the duty of the presiding judge to modify all instructions, "so as to make them conformable to his own views of the law." In the exercise of this right, this court is to presume that the high and dignified tribunals to whose discretion it is previously committed, are always actuated by motives consistent with the delicate, responsible, and important trusts confided to their care. While, therefore, we admit the soundness and force of the views of counsel of the impolicy, as a general rule, of the unnecessary interfer-

ence of the court in modifying instructions for the defendant, drawn with legal accuracy and precision, both as to the terms employed and the principles declared, yet this is matter of discretion and taste for their determination, and not ours, so long as they properly declare the law given in charge.

In this case we think the law was properly expounded by the court below, when considered altogether, according to the established rules referred to, and in reference to the testimony in the cause. And we feel satisfied that the jury could not have been in any manner misled, to the prejudice of the defendant, by any instruction or modification, exhibited in the record as having been submitted to the consideration of the jury.

The last ground of error insisted on is that the verdict of the jury was contrary to the evidence, and the court should have granted a new trial.

But for the able, earnest, and ingenious review of the testimony in the cause, by the respected counsel who seemed seriously to entertain this view, we should have regarded this last assignment as *pro forma* only. Impressed, however, with the zeal, as well as the candor of the argument, insisting on this ground, we have carefully examined the whole testimony in the record, in reference to the accuracy of this position, but are unable to discover any good reason in the testimony to doubt for a moment the correctness of the verdict, or the judgment of the court refusing a new trial.

The circumstances of the case show deliberation, preparation, concert, to violate the laws of the land, and desecrate the sanctity of domestic peace and privacy. That, in the prosecution of that unlawful purpose, the defendant, with others, his relation and friends, went to the residence of the deceased and her brother, William Smith, then both residing with their father and mother. And, even according to the account of his own witness and accomplice, Wooley, when respectfully approached by William Smith, answering to his call at the gate, "told him he wanted nothing to do with him—wanted to see the old man;" according to the old man Smith's testimony, as well as other witnesses, defendant commenced the difficulty, and made the assault upon Smith, who was wholly unarmed, shot him

twice, shot at him a third time, then turned from him, rushed in an opposite direction toward the deceased, who, in her natural indignation at the outrage committed on her brother, only said to him, "You had better be getting away from here," and shot and killed her.

The proof is positive, both by his own confession and the testimony of several eye-witnesses, that *he* did the act. The circumstances all show that no one else could have done it, if the testimony be true. We can see no pretence for the defense that it was done *accidentally* by him; or for the more inconsistent one, that it was not done by him, but by some one else having a rifle.

We think the verdict of the jury was not only warranted by the testimony, but imperatively demanded by the atrocity of the crime it developed; and, while we lament the necessity which invokes our agency in the dreadful doom we are called to pronounce, as the ministers of the law, on the wretched offender, we still feel admonished by that very necessity, that in our firm and faithful adherence to the rigorous enforcement of its precepts, is to be found the only safety of good citizens, the security of home, and even protection to its helpless inmates.

Let the judgment be affirmed.

BELOTE *v.* STATE, 36 Miss. R., p. 96.

LARCENY.

Though confessions improperly obtained from accused are not admissible, discoveries made and acts done in consequence of such confession, and in corroboration thereof, are admissible. And *quære* whether such confession, so corroborated, may not also be admitted on account of the corroboration.

By means of a confession improperly obtained, property alleged to have been recently stolen was found and identified; *held*, that the finding was admissible in evidence against the accused, whether the confession was or not.

The possession of recently stolen goods, if unexplained, is presumptive evidence of guilty; and what facts or circumstances are sufficient to explain such possession is, for the most part, to be determined by the jury.

Testimony, to give which any force against the accused, the jury would have to indulge unwarrantable conjectures to his prejudice, is irrelevant and admissible.

Error to Tippah circuit court. SCRUGGS, J.

The plaintiff in error was indicted for the larceny of ten bank-bills, each of the denomination of five dollars, and the property of Ephraim Strout. He pleaded not guilty.

Ephraim Strout, for the State, testified as follows: About the —— day of November, 1857, witness lost about one hundred and sixty dollars, in bank-notes of the Empire Bank of the State of Georgia; that each of said notes was of the denomination of five dollars; he kept the money in a pocket-book, which he laid upon the mantle-piece, behind the clock; the defendant was at witness' house on the Saturday preceding the Sunday on which the money was missing; there were some persons working about witness' house at the time, and at first he suspected them; but afterwards he suspected the prisoner, and about three weeks after the money was stolen, he charged him with stealing the money; witness said to the prisoner, "that if he would confess and tell all about it, and tell witness where the money was, and give it up and leave the country, he (witness) would not;" "upon this statement of the witness to the prisoner, he agreed to do so, and did tell where the money was, and confessed having taken it." To the introduction in evidence of this statement of the prisoner, he objected. This objection was sustained, and the evidence ruled out. The district attorney then asked the witness "to tell what the prisoner did in regard to the showing of the money;" and in answer to this question, the witness said "that the prisoner went to the corn-crib and got ninety dollars of the money out of the crib, and gave it to witness; witness saw the defendant get the money, and it was of the same kind that the witness had lost—all five-dollar bills, and witness believed the bills were his." To the introduction of this proof the defendant objected; but his objection was overruled, and the evidence went to the jury, and the defendant excepted.

The state then introduced L. M. Denny, the prosecutor, who stated that he had known the prisoner for three years, and lived in the same neighborhood where the money had been lost; that hearing that the defendant was charged with taking the money, witness went to defendant, and told him "it would be better for him to tell all about it; that if he did not, he

would be prosecuted and sent to the penitentiary, or prosecuted for it; that if he (defendant) would tell all about it, witness would stand up to him; and that as some talked of beating him, witness would not suffer him to be hurt;" and thereupon defendant said to witness, "he would get forty dollars of the money." To this statement of defendant, as deposed to by witness Denny, the defendant objected. This objection was sustained, "and the confessions ruled out." The district attorney then asked witness to state "what the defendant did in regard to the money." In answer to this, the witness stated "that the defendant, witness, and one Matthis, went to the defendant's house, which was about sixty yards off, and that soon afterwards the defendant went out of the house to get some brush to kindle the fire with; witness remarked to Matthis that defendant stayed a good while, and asked Matthis to go and see where defendant was; Matthis went out, and presently witness heard a rap at the door, and witness went to the door, and Matthis then asked witness to come out; witness did so, and went round to the chimney, where defendant and Matthis were; thereupon Matthis handed witness some money, and told witness to count it, which witness did, and found that there was fifty-five dollars of it, all in paper money, and in five-dollar bills; but witness does not know what banks these bills were on." This last statement of the witness, in regard to the defendant's acts, was objected to by defendant, as incompetent evidence; but his objection was overruled, and he excepted.

The witness then, on cross-examination, stated that the defendant was, at the date of the loss of the money, and had been for some time previous thereto, very intemperate; that he was weak-minded, and, when under the influence of liquor, was almost insane; that the prisoner's father was a respectable and honest man, and that, whilst prisoner was a boy, and previous to his marriage, he was regarded as honest; but that he married into a bad family, and since then had kept bad company, and was surrounded by men of bad character; and that relations of his wife, of doubtful character for honesty, shrewd and smart, were in the habit of staying at defendant's house; and that one or more of them were suspected of having stolen

Strout's money; that they had opportunity to do so, and witness "believed at the time, and still thought it most likely, that one of the men had stolen the money, and put it off on defendant in some way."

This was all the evidence, except the admission in the bill of exceptions "that all technical points were proven, except the felonious taking and carrying away the money as charged."

The court, at the instance of the State, instructed the jury as follows:

1. If the jury believe, from the evidence, that the defendant took the bank-bills of Ephraim Strout, with intent to apply them to his own use, they will find him guilty.

2. If the evidence satisfy the jury that Ephraim Strout lost bank-bills, and that they, or a part of them, had been found in defendant's possession shortly after, in the absence of other evidence proving how defendant came into possession, they will find him guilty.

3. The guilt of the defendant may be proven by circumstantial as well as by direct proof.

To the giving of all which the defendant excepted.

The defendant asked the following instructions:

1. If the jury have a reasonable doubt of whether defendant did feloniously take the money or not, they must acquit.

2. That when a man is taken in possession of property, his statement of how he came by the property cannot be offered by the defendant, though it may be by the State.

The first was given, and the second was refused. The defendant excepted.

The jury found the defendant guilty, and he moved for a new trial, which was refused, and he excepted, and sued out this writ of error.

F. Anderson, for plaintiff in error.

The points presented for the consideration of the court arise, first, out of the exception taken to the admission of the testimony of the witnesses Strout and Denny. These witnesses having stated that confessions were made to them by the prisoner, under circumstances which rendered them inadmissible,

were permitted, nevertheless, to state the conduct and actions of the accused, in the one case, in going to a crib and getting ninety dollars of the same kind of bills that witness (Strout) had lost, "all five-dollar bills," and which witness believed were his; and the other, in standing by while one Thompson Matthis (not a witness in the cause) handed the witness $55 in paper bills, but on what bank witness did not know, the accused having first gone out of the house, and afterwards being followed by Matthis, who presently returned to the door and called to witness to come out there, which he did, and went round to the chimney where they were, and where the money was handed to witness by Matthis. This witness showed that the prisoner was threatened with beating, and he promised to protect him if he would confess.

This testimony, upon clear principles, was inadmissible. If it amounted to anything, it amounted in each case to a confession, which, being under the influence, in one case, of promises, and, in the other, of threats and promises, was inadmissible.

Without presenting, at present, the question whether the facts were discovered in consequence of the confession, viz., the finding the money in the one case in the corn-crib, and in the other in the chimney-corner (if that is a fair inference from the testimony on this point), I insist that nothing but those facts, unconnected with the confessions, were inadmissible. I think that the rule established in the case of Jordan v. State, 38 Miss. R. 382, excludes both the facts disclosed and all parts of the confession or conduct of the accused, when he acts under the influence of hope or fear. But, to understand the bearing of that case, let us see how the law stood on authority before its decision.

The general rule was, that though the confession was inadmissible, yet facts brought to light in consequence of it might be used; and it was held that, where, in consequence of an inadmissible confession, property stolen was found at the lodgings of the accused, between the sackings of her bed, the fact of finding the goods only could be proved. 2 Russell on Crimes, 861. See, also, 1 Leach, Cr. C., 298, Warickshall's case.

So, where the excluded confession showed that the goods had

been disposed of to a particular person, that person might be called to show that he had received the property. 2 Russell on Crimes. 861; 1 Leach Cr. C., 431, Lockhart's case.

This, I insist, is the most that the English authorities, fairly construed, allowed. It is true that Russell, at the page last cited, says that the cases have gone farther, and that where inadmissible confession describes the place where the goods were concealed, evidence might be given that the accused did so describe the place, and that the goods were afterwards found there, citing 2 East Pl. Cr., 658, to sustain him. It is to be observed, however, that East, at the page cited, does not fully sustain the doctrine of Russell, but says in fact that this is going too far, and that the most that is proper to be left to the jury is the fact of witness being directed where to find the goods, and their being found there, but not the acknowledgment that he stole them or put them there. 2 East, 657, 658.

And this is acknowledged by the former author to be a proper limitation, for, on the next page, 862, in stating the rule, he says again: "That so much of the confession as relates strictly to the fact discovered may be given in evidence; it is common practice to leave to the jury the fact that the witness was directed by the accused where to find the goods, and his finding them there, but not the acknowledgment that he stole them or put them there, which is to be collected or not from all the circumstances of the case." 2 Russ., 862.

The author here cites 2 East, 658, as above, and also the case of Rex v. Gould, 38 Eng. C. L. R. But in the note on this page of Russell, it will be seen that Phillips, after stating the case of Rex v. Gould, adds, "But the judge would in such case direct, and so it is understood did direct, the jury in that case, that his (prisoner's) statement must not be taken as proof that he concealed, but only as evidence that he knew or was privy to the concealment, from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself."

Again, on the subject of acts done after a confession improperly obtained, Russell says: "It has been determined, after consultation of all the judges, that any acts done afterwards

may be given in evidence, notwithstanding they may have been done in consequence of the confession," citing 1 Leach, 298, Warickshall's case; see 2 Russ., 863. He is evidently here speaking of acts of the prisoner in the nature of confessions. But on examination of the authority cited, 1 Leach, 298, and those cited in the note to that case, it will be clear that only such facts transpiring, *inter alias*, as may be found by extraneous evidence, are referred to.

Again, at page 863, this authority says: "From a recent decision it would seem that what the prisoner says at the time such acts are done may also be received in evidence," citing Rex v. Griffin, Russ. & Ry. C. C., 151; and this authority sustains the citation, but, as I will hereafter show, on the same day the same court held directly the reverse.

I have shown above the farthest point to which the strongest English authorities on that side of the question have gone, and have been thus particular in doing so for the purpose of calling attention to the extreme caution manifested in violating the true rule, that neither the acts nor the words of the prisoner obtained under duress should be used against him, and the qualifications and limitations which even those courts which have departed from the rule have laid down for their action.

But the weight of English authority is against the above views stated by Russell, and held by the authorities cited by him.

Hawkins' P. C., 595, states the rule thus: "If any facts arise in consequence of an admission" (incompetent itself), "they may be given in evidence, because they must ever be immutably the same, whether the confession which disclosed them be true or false, and justice cannot suffer by their admission. The truth of these contingent facts, however, must be proved independently of, and not coupled with, or explained by the conversation or confession from which they are derived." 2 Hawk. P. C., bk. 2, ch. 40, § 35.

Lord Eldon, in the case of Rex v. Hervey, held "that in case of an inadmissible confession it was proper to direct an acquittal, unless the fact proved" (by extraneous evidence) "would have been sufficient for conviction without any confession lead-

ing to it." (I cannot obtain the report of this case, but it is cited in 2 Russ., 862, and 2 East, 658.)

In Rex v. Jones, Russ. & Ry. C. C., 152, decided on the same day, and by the same court which decided the case of Rex v. Griffin, last cited from Russell, a directly opposite rule was established. In this case the accused, under a promise of favor, handed to the prosecutor eleven shillings and six-and-a-half pence, saying it was all he had left of it, and it was held that this testimony was inadmissible, and that the conviction was wrong.

In Rex v. Jenkins, Russ. & Ry., 492, the accused, under a promise of favor, confessed, and carried the officer to a house as the house where he had disposed of the property, and pointed to the persons to whom he had disposed of it, who, however, denied it, and the property was not found; it was held that the acts of the prisoner were not admissible.

It may be said that in this case there is a distinction, because the act, in the nature of a confession, was not confirmed by finding the property; but this, as will be shown directly, makes no difference in principle.

In 1 Archbold Cr. Pl., 130-1-2-3, the above cases are cited and discussed, and the author holds that the only question in such cases which can be asked is, whether, in consequence of something the witness heard from the prisoner, he found anything, and where, and the witness, in answer, can only give in evidence the fact of discovery. He refers to one case as going further than this, and that is the case of Rex v. Griffin, cited above from Russell; but he cites in opposition both the cases of Rex v. Jones and Rex v. Jenkins, and, in reference to the latter, holds that the fact of the goods not being found makes no difference; and if in this case the goods had been found at the house, the witness might have proved he found them there in consequence of something he heard from the prisoner; but whether that would let in proof of the prisoner's act in going with the officer, is quite a different question.

It is evident that this author sees no difference between words of confession, or acts which are in the nature of confessions; and the same may be said of Russell, for endeavor-

ing to make out the point that such acts are admissible, he is compelled also to hold that such parts of the words of confession as relate to the fact discovered and found, are also admissible. There is certainly no difference in principle between them, for the acts may be stimulated as well as words; and if acts are let in because the inference from them is confirmed by the facts found, words should also be, because in each case the words, as well as acts, if confirmed by the other proof, must, in the language of Hawkins, be "immutably true."

The latter view of the English authority, the doctrine of Lord Eldon, Hawkins, and Archbold, and the cases last cited, are fully sustained in State v. Aaron, 1 Southard's Rep., 239.

It is said that the case of Van Buren v. The State, 24 Miss., 516, is in opposition to this view; but on examination of that case, the question was not presented, and what the court there says is only a dictum.

The case of Jordan v. The State, 32 Miss., 382, is directly in point, and fully sustains our view. It may be said that there was a case of compulsion, but there is no difference in principle; and if there were, one of our exceptions (that to the testimony of Denny) falls fully within the distinction, as the witness states that as some talked of beating the accused, he, witness, would protect him, if he would confess, and not suffer him to be hurt.

But the property found was not sufficiently identified. This point, and the authorities cited on it, will become important, in connection with the instruction to be hereafter discussed.

The bare circumstance of finding in one's possession property of the same kind that has been stolen, unless from marks or other circumstances it can be identified, is not, in general, sufficient evidence, unless the fact is of such very recent occurrence as to afford a reasonable presumption that the property could not have been acquired in any other manner; in which case the court is warranted in concluding it is the same, unless the prisoner can show the contrary. And to illustrate this principle, the cases are put in the authorities of a man coming out of another's barn, and corn found upon him of the same kind with that in the barn, and of one coming from ships or wharfs, with sugar or other articles of like kind upon him; and this is only

to be understood of such articles as are not susceptible of identification. 2 East Pl. C., 656, 657; 2 Russ., 124; 2 Archb. Cr. Pl., 369–4–5, 370–1–2, notes. See also Jordan v. State, 32 Miss. R., 386, where the court says, in reference to such cases, the place of finding and knife found must both agree with the description given by the accused; and if a discrepancy in either or both appeared, the court should have excluded the evidence.

Second. The second instruction granted on behalf of the State was erroneous. It declares that if property is lost, and found in possession of defendant shortly after, the jury should convict, or, rather, they are directed to convict. This is not the true rule. The rule is, that a felony must be proved to have been committed, and then possession shortly afterwards, unexplained, warrants only a presumption of guilt. 2 East, 656–8; 2 Russ. Cr., 124, 125; 2 Archb. Cr. Pl., 369, note.

But this is only a presumption of fact, which may or may not, under all circumstances, authorize a conviction. The rule is one of necessity, and it is admitted that under it many innocent persons have suffered. Great strictness is therefore required in its application. In the case of lost property, possession is not presumptive evidence of larceny, even if lost property is the subject of larceny. Whether in any case, and if so under what circumstances, lost property may be the subject of larceny, is a question which will come before the court in another case; and I do not, therefore, desire to obtain a judgment from the court on this point in this case; but even where it is held the subject of larceny, as in England, it is well established that to constitute larceny in such case, it must appear that the finder had the means of knowing the owner; and further, that the felonious intention to convert the property must have been entertained *eo instanti* of the finding, and this must appear. Regina v. Preston, 8 Eng. L. & Eq. Rep., 589.

It is clear, therefore, that as a legal proposition, it is erroneous to say that the finding a party in possession of lost property, recently after the loss, is evidence of the larceny, since the additional facts above indicated must be shown to the satisfaction of the jury. On the contrary, the larceny itself must be found by the best evidence the nature of the case admits, before you

can resort to any presumption of guilt founded on recent possession; and where circumstances are resorted to to establish a felony, as the foundation of such presumption, they must be such as are irreconcilable with any supposition but that of guilt in the taking. 2 Arch. Cr. Pl., 368–1, note.

It may be said that there is no proof going to show a loss, and therefore there is no error to the injury of the accused. We answer, that the instruction was one applicable to the case as proved by the state, and that it evidently secured the conviction of the accused, and the state cannot be heard to say the accused was not injured. It was a question for the jury to decide, whether a larceny was proved, and they are, in effect, instructed that the main and essential point, as shown by all authorities, viz., proof of a felony before you can resort to the presumption from possession, was not necessary to be proved. But in point of fact, the proof, which we will not here discuss, may have left very grave doubts whether a larceny was in fact committed.

But this is not the main ground on which we object to the instruction.

The instruction was, that the jury will convict on the proof of possession shortly after, &c. There is not a case which has gone this length. The possession affords only a presumption of a fact, which, therefore, may or may not be true, and which, therefore, the jury, under the particular circumstances of the case, might disbelieve. All the authorities hold that it amounts only to a presumption, strong or weak, according to the circumstances of the case, among which are enumerated particularly the length of time after the larceny, compared with the character of the goods, and their facility of being exchanged from hand to hand. It is a presumption, too, of so weak a character, that it may be rebutted by proof of good character alone, or of unsuspicious conduct of the accused. 2 Arch. Cr. Pl., 369–4.

Russell lays down the rule thus: That it is one of necessity, which will probably seldom lead to a wrong conviction, if due attention be paid to the particular circumstances of the case, among the most prominent of which he enumerates the length

of time, the conduct of the accused, the character of the goods, &c. 2 Russ. Cr. 123; 2 East, 657.

Justice Coleridge, in a case where two sacks were found in possession of a person twenty days after the larceny, says to the jury, "If I were to lose my watch, and in a few minutes it were found in the possession of one of you, it would afford the strongest ground for presuming you had stolen it; if a month after it were found in your possession, the presumption would be greatly weakened, because stolen property usually passes through many hands." 2 Russ. Cr., 123.

As some articles pass from hand to hand much more rapidly than others, the nature of the articles ought to be taken into consideration by the jury in determining whether the possession is so secret as to lead to the conclusion that the prisoner stole them. 2 Russ. Cr., 124.

In Rex v. Partridge, 32 Eng. C. L. R., 627, Patterson, justice, said, "I think the length of time is to be considered with reference to the nature of the articles. If they are such as to pass from hand to hand rapidly, ten months would be a long time, but here it is not so. It is a question for the jury."

Finding goods in the house of the person is not sufficient. Rosc. Cr. Ev., 18; 2 Russ. Cr., 123, n., citing Starkie.

In the case of Rex v. Adams, an axe and a mattock were found in possession of the accused three months after the larceny, and it was held not sufficient to put him on his defense. 2 Arch. Cr. Pl., 370–1, n. 2; Jones v. State, 26 Miss. R., 247.

Again, if it should be held that the identification of the articles is a subject for the jury and not the court (in which latter event the testimony of the two witnesses should have been excluded), then it is clear that the question of identification becomes an important one in ascertaining the force of the presumption. On this point see the authorities before cited, and also Montgomery v. The Commonwealth, 11 Metcalf Rep., 537.

From these authorities I think it is clear that the whole subject is one for the jury, to judge of the presumption according to all the facts, and the weight to which it was entitled, under the particular circumstances of the case, and that it should have

been left to them without instruction that if the possession were found they should convict.

Another valid objection to this instruction arises out of the rule as established. The accused is not required to show by proof, as this instruction required, how he came by the property. If he make himself a rational explanation, and that explanation is not disproved by the state, he is entitled to an acquittal. 2 Arch. Cr. Pl., 369-5.

The accused was as much entitled to the benefit of that principle in this case as if proof had shown that he did give a rational explanation, and that explanation were uncontroverted in the proof; and for this plain reason he was prevented by the prosecutor and witnesses from giving it. He was placed under the influence of hope and of fear, which, according to the principle of evidence, incapacitates him from telling the truth and giving a true explanation, and, therefore, his statements are excluded. Had he been given the chance, he might have explained.

I do not discuss the evidence, as I propose to do so in an oral argument.

T. J. Wharton, attorney general.

It might be argued with more than mere plausibility, on the authority of many late and leading cases, in which former decisions are reviewed and the conflict settled in favor of the proposition, that to render a confession inadmissible, on account of being superinduced by threats or promises, should have been made by those in authority, or the party at least have been put in duress; and I only now incidentally refer to a few of them, to show that the plaintiff in error has no just ground to complain of the action of the court below in admitting the *facts* and *acts* above noticed.

"The chief question, it is said, is whether the inducement held out to the prisoner was calculated to make his confession an untrue one; if not, it will be admissible." Whar. Am. Cr. L. (2d ed.), 256; Russ. on Cr., 845.

In Archb. Cr. Pl. (5th Am. ed.), 140, it is said, "It seems there has been a difference of opinion on this point, whether a

confession made to a person who has no authority, after an inducement held out by that person, is receivable or not. In a recent case, however, it was stated that it was the opinion of the judge that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and that if a person not in any office or authority held out to the accused party an inducement to confess, this will not exclude a confession made to that party." Queen v. Sarah Taylor, 8 C. and P., 733.

Many other authorities of the like kind might be cited, but as they relate to a point which was ruled against the state in this case, and I cannot have the benefit of a revision of them in this court, I will not enlarge upon them. I only refer to them incidentally, and to deduce the conclusion that if the confession were improperly ruled out, the prisoner has no cause to complain; he was benefited at least to the extent of their exclusion; and if both the confessions and acts, to wit, the pointing out of the place, and going there and getting the money, were inadmissible, the latter were clearly so. But upon the supposition that the court properly excluded the confession, I will endeavor to show that it as properly admitted the acts named above.

In the case of Van Buren (a slave) v. The State, 24 Miss. R., 512, the plaintiff in error was indicted and convicted of burglary. It was proved that his employer charged him with the crime, and whipped him, but obtained no confession. The same evening he took him up and threatened to whip him again, when he confessed having gone into the barn at night, and taken from there certain articles, stating where they could be found, accompanied him to the place pointed out in his confession, and showed him the articles. This court held that the confession was inadmissible, but say, "No objection is made to the admission of that part of the evidence of the witness detailing the conduct and action of the prisoner in pointing out the whiskey and sugar. These were facts which it certainly was competent to prove."

In Arch. Cr. Pl. (5th Am. ed.), 144, the author says, at the conclusion of a review of the doctrine of the admissibility of

confessions, "Although a confession for the above or any other reasons, may not be received in evidence, yet any discovery that takes place, in consequence of such confession, or any act done by the defendant, if it be confirmed by the finding of the property (Rex v. Jenkins, Russ. & Ry., 492), will be admitted; as for instance, if a man by promise of favor, be induced to confess that he knowingly received certain stolen goods, and that they are in such a room in his house, and the goods be found there accordingly, although the confession itself cannot in that case be given in evidence, yet it may be proved that in consequence of something the witness heard from the defendant, he found the goods in question in the defendant's house. And it would seem, from a late decision, that declarations of the defendant accompanying such acts may be received in evidence, even though the confession itself may be inadmissible." Rex v. Griffin, Russ. & Ry., 151.

Wharton's Cr. L. (2d ed.), 257, thus states the rule: "Although confessions obtained by threats or promises are not evidence, yet, if they are attended by extraneous facts which show that they are true, any such facts, which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony, where the party thus confessing points out or tells where the stolen property is, or where he states where the deceased was buried;" and in support of the doctrines of the text, he cites, among many others, two very strong cases, one the case of Hudson v. The State, 9 Yerger, 408, and The State v. Brick, 2 Harring., 530.

In the first of these cases a confession had been made by the defendant under promises of favor, that he had stolen the money; he then went with several persons down into the woods, about a half a mile from the prosecutor's house, and dug into the ground at the root of a tree, and took from thence the bank-notes stolen; he went a little further on and dug out of the ground the silver coin stolen. The court, referring to these facts, say, "This could not have been done unless he had deposited it there himself, or knew who did, and that the fair and legal presumption is, that he did it himself;" and after the

rule, as above laid down by Archbold, as to the confessions, they say, "If property has been stolen, and a person accused of the offense points out the place where it is concealed, he must be considered the thief, unless he can reconcile his knowledge with his innocence."

In the case from 2 Harrington, *supra*, the prisoner was indicted for stealing a package of bank-notes, sent by the bank to which they belonged, through a passenger, to one Campbell, in Philadelphia; the prisoner was the driver of the stage in which the passenger traveled, the bank-notes were in a sealed package, a part of them was found upon the prisoner, and others secreted about the house of the prisoner. He confessed that he found them lying in the stage sealed up. In pursuance of his confession, a part of the money was found. He confessed, after being advised to do so, and being told it would be better for him. The court, after adverting to the several rules before noticed, say, "But where the confession leads to the discovery of the property, or produces a development of facts which, *per se*, show the guilt of the party, these are to be considered by the jury."

The doctrine, that no part whatever of the confession is to be received in evidence, was laid down by Lord Eldon, in Hervey's case, 2 East P. C., 658.

Roscoe, however, says the rule was applied too strictly; and in Butcher's case, 1 Leach's Cr. L., 301, note *a*, so much of the confession as related strictly to the fact discovered by it was held admissible; "for the reason of rejecting extorted confessions, is the apprehension that the prisoner may have thereby been induced to say what was false; but the facts discovered show so much of the confession as immediately relates it, to be true." Roscoe's Cr. E., 47.

Russell, referring to the same *dictum* of Lord Eldon, in the above case, after reviewing a multitude of cases on the point, says: "As far as these cases go, there can be no difficulty as to the propriety of their decisions, because the bare facts of the property being found in the possession of the prisoner, in the one case, and his dealing with it as his own in the other, would, unconnected with any confession, have been clear evi-

dence in support of the prosecution. But the cases have gone further than this; for it has been held, that on a prosecution for receiving stolen goods, where a confession had been improperly drawn from a prisoner, in the course of which he described the place where the goods were concealed, evidence might be given, *that he did so describe the place*" (the italics are the author's), "and that the goods were afterwards found there. In this case it is clear that the bare fact of finding the goods would be no evidence against the prisoner, unless coupled with a part of the improperly admitted confession. *And some* have accordingly doubted whether *any part* of such a confession can be improperly used for such a purpose. Thus, in Harris' case, Lord Eldon said, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it; and he so directed the jury in that case. *But the more established rule, according to later practice and later authorities, is that so much of the confession as relates strictly to the fact discovered by it may be given in evidence.*" He assigns the reason already quoted from Roscoe. 2 Russ. on Cr., 861–863; see also 1 Ph. Ev. (old ed.), 116, 117, 168, 169; Whar. Am. Cr. L. (2d ed.), 255–259; Greenl. Ev., 256 (quoted in 2 Russ. Cr., 828, note *r*).

Cowen & Hill, in their notes, 2 Ph. Ev., 249, 250, referring to the doctrine laid down, *supra*, in 1 Phil. Ev., 116, and the contrary doctrine asserted in the authorities read in oral arguments by counsel for plaintiff in error, say: "Yet there is a strong current authority running with the text, that both the disclosure and the fact or circumstance connected with and going to its corroboration, shall also be received, and they go to the jury with their joint force." And as to what may be considered corroborating circumstances, see State v. Aaron, 1 South. R., 238, read by Mr. Anderson, and that of the State v. Guild, 5 Halst. R., 185, 186, the same court (N. J.), read by me. See, also, State v. Moore, 1 Hayw., 482; State v. Jenkins, 2 Tyler, 377; Hudson v. State, 9 Yerger, 408; Rex v. Griffin, 1 Eng. Crown

Cases (Russ. & R.), 151; Rex v. Warickshall, 1 Leach C. L., 298, and note to Butcher's case; Rex v. Lockhart, ib., 430.

It is true that, on the same day the case against Griffin, *supra*, was decided, the case of Rex v. Jones, reported at page 151, 1 Eng. C. C. (Russ. & R.), was decided by the same court, in which the prosecutor asked the prisoner, on finding him, for the money he had taken out of the prosecutor's pocket; but before the money was produced, said "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased; upon which the prisoner took 11s. 6½d., and said it was all he had left of it." It was held that the confession ought not to have been received.

In Griffin's case, a majority of the judges, viz., Lord Ellenborough, Mansfield, C. J., Macdonald, Heath, Grose, Chambre, and Wood, held the conviction right, and the evidence admissible. Lawrence and LeBlanc were of a contrary opinion—seven to two.

In Jones' case, Macdonald, Chambre, Lawrence, Le Blanc, and Heath held that the evidence was not admissible, and the conviction wrong; Wood, Grose, Mansfield, *contra*; Lord Ellenborough *dubitante*—five to three, and two of those five, Lawrence and LeBlanc, being the two who had dissented in Griffin's case.

The case of Rex v. Row is the very next case after Jones', reported in the same book, decided on the same day—all the judges present who sat on the trial of the other cases, and all concurring in the opinion, that where persons, having "nothing to do with the apprehension, prosecution or examination of the prisoner, admonishing him to tell the truth and consider his family," that such admonition was no ground for excluding a confession made an hour afterwards to the constable in person. The reporter adds that "this case and the two former (Griffin's and Jones'), being so much in *pari materia*, Chambre, J., stated them together, and reserved the question on the admissibility of the evidence for the opinion of the judges, in consequence, as he stated, of the obscurity and discordance of the cases upon the subject that are in print." In note (*a*) to the case (Row's, *supra*), is a reference to Warickshall's case, from 1

Leach, *supra*, and to the cases, Ph. Ev., 112, 4th ed.; and to Stark. Ev., part 4, page 49.

In Regina v. Gould, 38 Eng. Com. L. (9 Carr. & P.), 156, it was held, that where anything is found in consequence of a statement made by a prisoner, under circumstances which preclude its being given generally in evidence, such part of it as relates to the thing found in consequence is receivable, and ought to be proved.

I have shown what the rule is, as laid down by all the approved authors (Greenleaf, Archbold, Russell, Starkie, Phillips, Roscoe, Wharton), in the exclusion of confessions obtained by threats, or promise of favor. I have also shown that the reason upon which the rule is founded is the apprehension that parties may be induced, by such influences, to make any untruthful statements; but the reasons of the rule, and the rule itself, cease when the discoveries consequent upon the confession verify the confession. There must be this coincidence or agreement. When the confession leads to a discovery of the fact, and the fact confirms the truth of the confession, they are indissolubly connected as *res gestæ*, and admissible. In Rex v. Jenkins, Russ. & R., 491, the court say: "If a confession was improperly obtained, it is a ground for excluding evidence of the confession, and of any act done by the prisoner, in consequence, towards discovering the property, unless the property is actually discovered thereby."

I will not repeat the argument I made upon the coincidences, establishing the guilt of the accused, drawn from the concealment of the money, the identification of the money (Georgia bank-notes, so large a number of five-dollar bills, not shown to be current in that quarter), the presence of the accused at the house of Strout the day before the money was missed. To say the least of them, they establish that presumption of guilt (connected with the testimony of Strout, proving sufficiently the *corpus delicti*) which is sufficient to convict unless rebutted.

2. There is no time fixed when the presumption of guilt from possession of stolen goods ceases. The jury is to look to the particular circumstances of each case in determining whether

the possession is so recent as to lead to the conclusion that the prisoner stole them. 2 Archb. Cr. Pl., 370, 1, 2.

In State v. Bennett, 2 Conn. Rep., 692, the above presumption was not rebutted by the lapse of two months between the theft and the finding. In State v. Montgomery, 11 Metc. R., 534, a package of bank-notes was stolen in December; a portion of them was found upon the prisoner the following March, and another portion in April: held to be within the above rule, taken in connection with other circumstances proved.

Wills on Cir. Ev., 64, under the head, "Recent Possession of Fruits of Crime," goes at large into the rule, and the cases within and without it.

In this case the prisoner retained them no longer because they were uncurrent bank-notes: 1st, Not so likely to get clear of them as of notes convertible into par funds; 2d, More danger of suspicion attaching to them as the thief. The mere possession and attempt to use so large an amount of Georgia bank-notes, all of the denomination of five dollars, would arouse the suspicion of those who knew that Strout had lost just that kind of money. I think it would be no such difficult matter as opposing counsel supposes, for any gentleman in Mississippi having $200 or $300 of Georgia bank-notes on hand, to tell where he got them, certainly easier that in the case put by him of my being suddenly called on to show how I came by a current five-dollar bill in my pocket at this time.

In regard to the case of Van Buren, 24 Miss. R., cited by me, and charged to be a *dictum* of the judge delivering the opinion, in the point to which it was cited, I claim that it is an express authority, recognizing and adopting the doctrine I have cited from the text-book. The court say that no objection is made to the admission of that part of the evidence of the witness detailing the conduct and action of the prisoner in pointing out the whiskey and sugar. These were facts which was certainly competent to prove. It is urged that as no objection was made in the court below to the admission of these facts, they were not presented in this court—were *coram non judice*—and hence what is said of that matter is a *dictum*. Well, I was counsel for the prisoner in the court below, and know that the reason why

no objection was made to their admission in evidence, is the very one given by the court here, because "they were facts which it certainly was competent to prove."

In reference to Jordan's case, 32 Miss. R., relied upon as a direct authority against me, and against the *dictum* of Judge Yerger, as it is called, in Van Buren's case, I have nothing to add to what I said in my oral argument. It is always an ungracious task to indulge in criticism upon an opinion before the court that delivered it. I am perfectly willing to trust this enlightened court to review that opinion, when it is suggested that possibly it may have gone beyond the true rule. If it has, its own discrimination will be much more apt than my poor powers of analysis to detect it, and its enlightened sense of justice will be sure to correct any errors it may detect.

On the point embraced in the objection to the second instruction given on behalf of the state, I shall have very little to say, for the reason that almost everything I have said on the first point, viz., the alleged error in the admission of the evidence of Denny and Strout as to the confession or acts of plaintiff in error, is as applicable to this as to that point, the instruction assuming and being predicated upon the evidence of those witnesses. If their testimony was improperly admitted, on the point of plaintiff's confession or acts, the court will reverse for that reason. If properly admitted, I maintain that the instruction is correct. Because there was that presumption of guilt before spoken of, which, unexplained and unrebutted by plaintiff in error, was sufficient to warrant his conviction. I can refer on this point only to a single case. Sartorious v. The State, 24 Miss., 602. The ruling of this court on the second instruction given on behalf of the state in that case, settles, as I think, the whole question arising on the second error assigned in this case.

HANDY, J.:

The plaintiff in error was indicted and convicted for stealing certain bank-bills of the denomination of five dollars, the property of one Ephraim Strout.

The grounds of error relied on are—

1. The admission, as evidence in behalf of the prosecution, of certain acts of the accused in showing where a part of the stolen property was placed; which acts were done after, and in consequence of his having made a confession of his guilt under such circumstances as to render that confession inadmissible.

2. The giving of the second instruction to the jury in behalf of the prosecution.

In relation to the first ground of error, it appears that two witnesses were introduced in behalf of the state on the trial. The first of these was Strout, the owner of the stolen property, who testified that he lost one hundred and sixty dollars in bank-notes, of the Empire Bank, of the state of Georgia; that the accused had been to his house on Saturday, the day before he missed the money; that the witness kept his money in a pocket-book, which he laid up behind the clock on the mantle-piece, and that the money was all in five-dollar bills; that witness at first thought the money was taken by some persons who were working about his house, but he afterwards suspected the accused of stealing it, and charged him with it. He further testified, that when he so charged him, which was about three weeks after the money was lost, he told the accused that if he would confess all about it, and tell where the money was, and give it up and leave the country, he would not prosecute him; and thereupon the accused told where the money was, and confessed having taken it. Upon motion of the accused, this testimony as to his statements and confessions, under the circumstances, was held by the court to be incompetent, and was excluded from the jury.

The witness was then asked by the district attorney to state *what the accused did in regard to showing the money;* and he testified that the accused went to the corn-crib, and got ninety dollars of the money out of the crib and gave it to witness; that witness saw him get the money, and that it was all of the same kind that witness had lost—all in five-dollar bills, and that witness believed them to be his. The accused objected to this testimony as inadmissible; but it was permitted to go to the jury, and exception taken thereto. And this is the first point to be considered.

It will be observed that none of the declarations or confessions

made by the accused to this witness were permitted to go in evidence to the jury, and consequently no question arises as to the competency of such declarations, under the circumstances of the case. The testimony admitted went solely to the acts and conduct of the accused, in showing where the money was, and in producing and delivering it to the witness, and to the identification of the money shown and produced.

Whatever diversity of opinion may exist upon the question, whether confessions improperly obtained, and which are verified and corroborated by facts and circumstances afterwards found to be in accordance with the statement of facts made in the confession, are admissible in evidence on account of the corroboration, there can be no doubt but that acts of the accused done in consequence of the inadmissible confession, and tending to show his guilt, should be received in evidence.[1] This was held in Warickshall's case, 1 Leach, 298; Mosey's case, ib., 301; and it is stated by all the text-writers upon the subject as the correct rule. 2 Russ. on Cr., 863 (7th Amer. ed.); 1 Phill. Ev., 116 (4th Amer. ed.). And it is also laid down that it is competent to show that the witness was directed by the accused where to find the goods, and that they were found there accordingly, but

[1] Archbold Cr. Pr. & Pl., 131; 2 Hawk., c. 46, § 38; Holt's N. P., 493; Charity Jackson's case, 1 C. H. Rec., 28; Tucker's case, 5 ib., 164; 2 Curw. Hawk., 595; State v. Aaron, 1 South., 235; Com. v. Knapp, 9 Pick., 496, 511; State v. Vaigneur, 5 Richardson, 391; State v. Motley, 7 ib., 327; Stage's case, 5 C. H. Rec., 177, 178; 5 ib., 164, 166; Rex. v. Griffin, Russ. & Ry., 150; Rex v. Jones, ib., 151; State v. Moore, 1 Hayw., 482; 2 Russell on Crimes, 861-2-3-4; 1 Phill. Ev., 411; Rex v. Harris, R. & M. C. C. R., 338; Allison's Cr. Law of Scotland, 583; Joy, 84; Lockhart's case, 1 Leach, 386; State v. Crank, 2 Bailey, 67; Roscoe Dig. Cr. Ev., 36, n.; 1 East P. C., 658; 2 ib., 658; Hudson v. State, 9 Yerg., 408; State v. Brick, 2 Harrington, 530. The more established rule, according to later practice and later authorities, is, that so much of the confession as relates *strictly* to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true. 1 Leach, 265; 2 East P. C., 658. Thus it is proper, and is now the common practice, to leave to the consideration of the jury, where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case. 2 East P. C., 658; Russell on Crimes, 862; Wharton Am. Cr. Law, 695; Hudson v. State, 9 Yerg., 408; State v. Brick, 2 Harring., 530; State v. Crank, 2 Bailey, 67; Deathridge v. State, 1 Sneed, 75; Jordan v. State, 31 Miss., 382; Duffey v. People, 12 E. P. Smith, 589; Jane v. Com., 2 Metc., 30; Rex v. Leatham, 8 Cox C. C., 498; Rex v. Gould, 9 C. & P., 364; Rex v. Evans, Harris, and Butler, 1 Moody C. C., 338; Rex v. Cain, 1 Crawford & Dix C. C. 371.

not the acknowledgment of the accused that he stole them or put them there.[1] 2 East Pl. Cr., 658; 2 Russ. Cr., 862.

In such cases it is not the confession of the party that is received in evidence against him, but the facts which are brought to light by his acts, and in consequence of his confessions. It will not do to say that the acts, having been brought about by improper means, are of the same character as confessions produced by the same means, and the influence which produced groundless confessions might also produce groundless conduct; for when the acts of the accused point out and produce the stolen property in its place of concealment, that fact speaks for itself, and is inconsistent alike with the idea of falsehood and of innocence. Property so concealed must be considered as in the custody of the accused, and his production of it is equivalent to its being found upon his person, or in his private keeping at his house; and in such cases, the finding or production of the property is evidence of guilt. The testimony permitted by the court to go to the jury was simply, in substance, that the witness charged the accused with stealing the money, and thereupon the accused showed the place where it was concealed, and produced and delivered it to the witness. If the money produced was the same which was stolen from the witness, there cannot be a doubt as to the competency of the testimony.

Was the money, then, sufficiently identified? The witness testified that the bills were all of the same bank and of the same denomination as those lost by him, and that he believed them to be his. This correspondence, taken in connection with a number of them of so small a denomination, and the fact that the witness believed them to be his, would go far to cast a suspicion upon the possession by the accused. But the fact that, upon being charged with stealing them, as the money of the witness, he produced them from the place of concealment and delivered them to the witness, is conclusive of their identity.

We think, therefore, that this testimony was properly admitted.

The second witness introduced was one Denny, who testified, in substance, that, in consequence of promises of protection

[1] See cases cited in note (*), *supra*.

made by him, the accused acknowledged his guilt. This was ruled out upon the objection of the accused, and the witness was then requested to state what the accused did in regard to the money. He testified that the accused and witness and one Matthis went to the house of the accused, and that presently the accused went out of doors to get some fuel, and that witness remarked that he stayed a good while, and requested Matthis to go and see where he was; that Matthis went out, and presently there was a rap at the door, and Matthis told witness to come out there, and did so, and went around to the chimney where they were; that thereupon Matthis handed witness some money, and requested him to count it, which he did, and found there were fifty-five dollars in bank-bills of five dollars, but witness did not know and could not state what banks they were on.

This testimony was objected to by the accused, but was permitted to go to the jury, and exception taken.

The facts here shown are quite different from those stated by the preceding witness. The bank-notes referred to are not shown to have been in the possession of the accused, or that he had any connection with them. It simply appears that they were produced by Matthis, who handed them to witness, requesting him to count them. Nothing is shown to explain why or how Matthis had possession of them, or why he handed them to the witness to count; nor is there anything to identify them with the notes stolen from the witness Strout. Giving to the facts stated by this witness all the force which they properly could have, they showed nothing tending to fix upon the accused the charge for which he is indicted. Nor was there any other evidence to supply the vagueness and irrelevancy of the testimony. To give it any force against the accused, the jury would have had to indulge in unwarrantable conjectures to his prejudice.

It was, therefore, improperly admitted, and the objection to it should have been sustained.

The second instruction given in behalf of the state is as follows:

"If the evidence satisfy the jury that Ephraim Strout lost

bank-bills, and that they, or a part of them, had been found in defendant's possession shortly after, in the absence of other evidence proving how defendant came into possession, they will find him guilty."

The first objection taken to this instruction is, "that it dispenses with the necessity of proving that the bank-bills *were stolen* from the owner; in consequence of which the accused might have been convicted under the indictment from the mere fact of possession of the bills unaccounted for, though they may have been casually lost by the owner, and had not been stolen."

It is true that the word *lost* is employed in the instruction; but that is a general word, which embraces a loss by stealing or by any act of another, as well as by the act of the owner himself, or by casualty; the evidence tending strongly to show that the money was lost by stealing, and there was nothing tending to show that it was casually lost. The general term used in the instruction must be taken with reference to the charge against the accused and the evidence offered in support of it, and must be understood with reference to such loss as the evidence tended to establish, which was by stealing. We do not consider the instruction erroneous in this respect, though it is true that the word *stolen* is more precise, and the better term to be employed. The phraseology could not have reasonably misled the jury, under the circumstances of the case.

It is further objected that the instruction renders the possession of the bank-bills by the accused, shortly after they were lost by the owner, conclusive evidence of guilt, whereas it merely creates a presumption of guilt. The general rule is undoubtedly well settled that the possession by a party of stolen goods, shortly after their loss by the owner, is presumptive evidence of guilt, which, however, may be explained; and if the party in whose possession they were found fails satisfactorily to account for his possession, the presumption of guilt, arising from the recent loss by taking, and the possession, will stand, and warrant a conviction. What will be sufficient to account for the possession, or to remove the presumption that may arise therefrom, will depend much upon the length of time which intervened between the loss by the owner and the discovery of

possession in the party charged, the nature and character of the goods, and all the circumstances of the case; and this, for the most part, is to be determined by the jury. These points might have been made the subject of instruction at the instance of the accused, and the attention of the jury might have been thereby directed to the shortness of the time, as shown by the evidence, in connection with the nature of the articles. But as the instruction stands, it does not take these considerations from the jury, but leave it open for the jury to determine the question whether the time shown was short, under the circumstances; and under it, that question might have been fully argued to the jury. If they were of the opinion, from the circumstances, as it must be presumed they were, that the time of production of the money by the accused was sufficiently short to raise the presumption of his guilt, and there was no explanation of his possession, the presumption of fact was not removed; and they were properly instructed that, in such case, they should find a verdict of conviction. This was the subject of the instruction, and we consider the general proposition contained in it correct.

For the error in admitting the testimony of the witness Denny, the judgment must be reversed, and the cause remanded for a new trial.

POPE AND JACOBS v. STATE, 36 Miss. R., 121.

LARCENY.

It is not every improper or illegal act of the officer in charge of a jury in their retirement, or of the jurors themselves, that will justify setting aside their verdict. To justify such a result, the act or misconduct must be such as is calculated to exert an improper influence on the verdict.

Where improper influence may have been exerted upon the jury, the presumption of law is against the purity of their verdict; but if it be shown that such influence failed of effect, the verdict will not be set aside.

A juror's testimony to impeach or sustain his verdict, is not admissible on hearing a motion for a new trial.

Error to Oktibbeha circuit court. WILLIAM L. HARRIS, J.

Henry Dickinson, for plantiff in error,
Argued the case orally.

C. J. Sullivan, on same side,

Cited, The Commonwealth v. Roby, 12 Pick., 496; Taylor v. Manly, 6 S. & M., 305; 9 ib., 115; Organ v. The State, 4 Cush., 78.

S. M. Meek, on same side.

There are only two points requiring the consideration of the court:

1st. The improper influence exercised by the bailiff, one of the officers of the court, over the minds of the jury, while he had them in charge. It was denied by the state, below, and doubtless will be denied by the state in this court, that what was said by the bailiff did amount to such improper influence, or meddling or tampering with the jury, as should set aside the verdict. Let us see what was his action towards the jury, and what his language was, upon which this branch of the motion is founded.

It is beyond question established, by the evidence of the bailiff himself, as well as by the jurors, who were permitted by the court to testify, that he did tell the jury, "That unless they decided the case, one way or the other, they should have nothing more to eat, and no water to drink." But the bailiff was not only understood to say this, but some of the jury thought he said that the judge said so. True, all of them say that they regarded it as a joke, and that it had no influence upon their verdict. No doubt they thought so. But, under any circumstances, this would be said to a jury. One or more of them might be influenced, and seeing the unpleasant attitude that he would be placed in, should he confess it, would of course deny that he had been influenced by the remark. True they are all presumed to be *probi et legales homines*, yet they are fallible, they are weak men, and may be operated upon by undue influences, and if so, they would be very loth to confess it.

But we respectfully submit it to the court, whether a man, a juror, one perfectly honest and disposed to do his whole duty,

both to the state and to the prisoners, might not be unduly influenced, and yet he himself be unconscious of the influence exerted? The human mind is so "strangely and wonderfully made," may there not be exerted upon its secret springs an unseen, and perhaps an unfelt influence, which would powerfully direct it to this or to that conclusion, and, at the same time, its possessor be totally unconscious of the controlling power? This principle, though it may not be universally held by lawyers, is recognized by intellectual philosophers. It is what they term "unconscious influence." But upon this point we are not entirely without legal authority. In the case of Hix v. Drury, 5 Pick., 302, the court says: "So, where a paper which is capable of influencing the jury on the side of the prevailing party, goes to the jury by accident, and is read by them, the verdict will be set aside, although the jury may think that they are not influenced by such paper; for it is impossible for them to say what effect it may have had on their minds." So in the case of McQuillen v. State of Mississippi, 8 S. & M. 596, Chief Justice Sharkey uses the following language: "Or if prejudices existed against him in the community, as is sometimes the case, there was danger that it might be communicated to the minds of these jurors, without their being aware of the motive or effect." At this day, when it is customary to allow jurors food and drink, they would take it as a peculiar hardship, if they were to be denied the necessary food and drink which would keep them comfortable during the determination of a cause; and a weak-minded man, one wanting in resoluteness of purpose, might be induced, through fear of this punishment, to go over to the majority or minority, as the case might be, and thus decide against his better judgment. He would regard it as tyranny, and might endanger the safety and liberty of the prisoners, to save himself from the penalty.

It will be perceived from the record, that the jury had been considering their verdict a whole night (Thursday), and until 3 o'clock P. M. on the next day (Friday). The cause was taken up on Wednesday afternoon, and the examination of witnesses and arguments of counsel continued until Thursday night. On Friday, at noon, they had not determined upon a

verdict. It was then that the bailiff made the remarks attributed to him; and, in a short time afterwards, they made up and returned their verdict into court. The circumstances all go to show that the remarks of the bailiff must have exercised an influence prejudicial to the rights and interests of the prisoners.

But let us examine this subject in the light of authority.

It is well settled that it is not necessary to show that the minds of the jury, or of any member of it, were influenced. It is sufficient to show that intermeddling did take place, to set aside the verdict. Too much strictness cannot be exercised in guarding trials by jury from improper influence. It has been said that "this strictness is necessary to give confidence to parties in the result of their causes; and every one ought to know that for any, even the least, intermeddling with jurors, a verdict will always be set aside." Knight v. Freeport, 13 Mass., 220.

This is the language of the supreme court of Massachusetts in a civil cause. How much more important is it to guard the purity of jury trials against improper influence when the matter at stake is the life or liberty of a prisoner.

The authorities upon this point all agree; and, as they are very numerous, we will only cite, for the attention of the court, a few of the most important.

In the case of Com. v. McCaul, 1 Virginia Cases, 271, it is said (in referring to the separation of the jury), "Although there might be, and properly was, no tampering with any juryman in this case, yet, in a free country, in deciding a particular cause, the decision must be, according to general principles, as applied to that case; and more good will arise for persevering in the sacred principles involved in that case, than will from granting a new trial, although in this individual instance, a verdict has probably been given by twelve men in fact unbiased by the separation."

In this case a majority of the court were of the opinion that actual tampering with the jury was not necessary to be shown, to set aside the verdict; it is sufficient if the opportunity be offered. A new trial was granted, although the court assumed

that the minds of the jury were entirely unbiased. They decide the great principle that the door to abuse must not be opened; that the court will not inquire into the circumstances of a particular case. It is enough if they are satisfied of the possibility of abuse.

The case of Com. v. Roby is, perhaps, the most important case outside of our own state. In this case the court enter into the questions presented with much clearness and ability, and examine many opinions bearing upon them. They say that "when the jury have had communications not authorized, then, inasmuch as there can be certainty that the verdict has not been improperly influenced, the proper mode of correction or relief is by undoing what is thus improperly, and may have been corruptly done."

But this court have adjudicated this very question, and referred to the authorities above cited, especially the last one. The rule which has been established by this court is, "that if the verdict be given under circumstances which might conduce to an improper influence, or the natural tendency of which might be to produce bias or corruption, it cannot be said to be above suspicion; and if it be not, it must fall short of that perfection which the law requires, and which, under a more guarded administration, is capable of producing. It is not necessary that any attempt should be made to bias the minds of the jurors, or that any pernicious influence should be exerted. The door to tampering is to be closed; this is the only security; for if it be left open, it may be predicted, with certainty, that evil consequences will fall somewhere. * * * * If the purity of the verdict might have been affected, it must be set aside: if it could not have been affected, it will be sustained. A verdict upon which doubts might rest cannot be good. It must command entire confidence." Hare v. State, 4 Howard, 192.

In this opinion Chief Justice Sharkey, who delivered the opinion of the court, adopts the language of Chief Justice Shaw in the case of Com. v. Roby, above referred to.

In the case of McQuillen v. State, 8 S. & M., 596, Chief Justice Sharkey delivered the opinion of the court, and said, "It is immaterial whether improper influences have been exerted or

not; the only safety is in keeping the jury free from any liability to such influences."

In the case of Lewis v. State, 9 S. & M., 121, the court says: "The trial by jury should be preserved free from all extraneous or improper influences. Confidence in the administration of justice can only be preserved by removing even the shadow of suspicion from those in whose hands it is intrusted."

In the case of Boles v. State, 13 S. & M., 402, Sharkey, Chief Justice, delivered the opinion of the court, and said: "But it has been argued that the verdict should stand, unless tampering or improper influence be shown. This would be a very unsafe rule. The prisoner, who is in confinement, would not be able, one time in a hundred, to show that a verdict had been procured by improper means, although such may have been the case."

In the case of McCann v. State, 9 S. & M., 469, the court says, quoting the language of the judge in Lord Delamere's case, "An officer is sworn to keep the jury, without permitting them to separate, or any one to converse with them; for no man knows what may happen; although the law requires that honest men should be returned upon juries, and, without a known objection, they are presumed to be *probi et legales homines*, yet they are weak men, and perhaps may be wrought upon by undue applications. The evil to be guarded against is improper influence; and when an exposure to such an influence is shown, and it is not shown that it failed of effect, then the presumption is against the purity of the verdict."

In the case of Nelms v. State, 13 S. & M., 508, Chief Justice Sharkey delivered the opinion of the court, and said: "The purity of the trial by jury must be strictly guarded. The verdict, when rendered, should command entire confidence; whatever may detract from that confidence must weaken the security which is felt in the community in this mode of trial. The officer is required by the nature of his duty, as well as by his oath, not to speak to the jury himself on the subject of their deliberations, or to permit others to do so. This ceremony is a mockery if a violation has no other effect than to subject the officer to punishment. If he may speak to them himself, he may permit others to do so, and the door is thus thrown open to tam-

pering, and the safety of trial by jury is invaded to an alarming extent. The duty of the officer is prescribed for the safety of the accused. If improper influences have been employed, it is a poor boon to say to him that the officer is liable. The officer may be willing to incur the punishment for the sake of gratifying his wishes, or for reward. One who thus violates his duty and his oath, should be subjected to the severest penalties; but that does not purify the verdict; it should be set aside."

This court, in a recently decided case, lays down and adheres to the rule established in Hare's case. They say, "If the verdict was rendered under circumstances in which its purity might have been affected, it must be set aside; if it could not have been affected, it will be sustained." Ned and Taylor v. State, 33 Miss., 364.

Now, to make an application of these principles to the case before us, can it be said that the purity of the verdict could not have been affected? Can it be said that there was no improper influence? that the verdict was rendered under circumstances which caused it to command entire confidence? Can it be said that there is no probability that it might have been affected by the language of the officer? Here the bailiff, a sworn officer of the law—sworn, too, in the presence of the jury, not to converse with them himself, or to suffer any one else to do so, "unless by order of the court, after they have retired from the bar" (Rev. Code of Miss., 604, art. 156), enters the jury-room, and tells the jury that, "unless they decide that case one way or the other, they shall have nothing more to eat and no more water to drink!" Some of the jurors testify that they thought that the bailiff said that the judge said so. One of the jurors also interrogated him, and inquired if the judge did say so? and even then he did not deny it. Of course, it must have been supposed that it came from the court; for no jury would suppose for a moment that any one else but the judge would attempt to enforce such measures upon them. Still less would they suppose that an officer who was discharging his duty, under the solemnity of an oath, would attempt to trifle with them, while deliberating upon an important cause, because, forsooth, he had become very weary in waiting upon them. They thought that

the remark had no influence upon their verdict. Just here it must be remembered that there were only eight jurors present out of twelve, and who testified upon the motion. Four were absent. Who will say that it did not influence the absent four?

But it is not necessary for the plaintiffs in error to show that the jury were influenced. It is sufficient if they might have been.

In the case of the Com. v. McCall, 1 Virginia Cases, 271, the court makes use of the following wise remarks: "From the mode in which collusion and tampering is generally carried on, such circumstance is generally known to no person except the one tampering and the person tampered with, or the persons between whom a conversation may be held which might influence a verdict. If you question either of those persons on the subject, he must criminate or declare himself innocent, and you lay before him inducement not to give correct testimony." If the accused were compelled to show the influence and its extent, their rights and interests might be constantly imperiled, of which they might be inwardly conscious, and yet possess no adequate remedy. It is sufficient, as stated by the court, in Hare's case, if the verdict might have been affected. The duty of the officer is prescribed for the protection of the accused; and if they show a gross violation of that duty, the presumption of law is, that they have been injured thereby. The case before us comes fully within the rule, and is, indeed, a much stronger case than either Hare's case or Nelm's case.

If such tampering, and intermeddling, and joking with a jury as this be allowed, anything may. If an officer who is sworn not to speak to the jury, is allowed to converse fully with them about their verdict, and that, too, with an authority which seemed to come directly from the court, surely any one else might be allowed the same privilege. If it were right, and proper, and lawful, for an officer who is sworn not to converse with the jury, unless by the permission of the court, to do so, certainly the door had as well be thrown open, and admit any one who may desire to enter. Verdicts have been set aside by this court, as in McCann's case, 13 S. & M., 471, because an unsworn officer had charge of the jury during a portion of their

retirement, although no undue influence was shown. It is as great a violation of the law for a sworn officer to converse with the jury as it is for an unsworn officer to have them in charge. Better, in fact, that an unsworn officer should thus have them in charge, than for a sworn officer to talk to them at will. The injury is as great in the one case as in the other, and either departure from the rule should avoid the verdict. The mere ceremony of swearing the officer is useless and idle, and should be abrogated, if he is allowed to violate it at his pleasure. This verdict is not above suspicion, and does not and can not command entire confidence and respect.

For this first branch of the motion, the verdict ought to be set aside, and a new trial granted.

2d. As to the jury having spirituous liquors in the jury-room during the progress of the trial.

It appears from the testimony that one of the jurymen, being sick, sent the bailiff after liquor, "to take as medicine." This "medicine," though in a black bottle (a very large dose, one would suppose), was doubtless taken in broken doses; it was not prescribed by a physician, nor was it given to the juror by the consent or through the knowledge of the court. The bottle of liquor was handed in by the bailiff. He did not see any of the jurors drink save Mr. Owen (the sick man), but he could not say that any one else did drink. This is substantially the testimony of the bailiff.

It was impossible for the accused to discover to what extent these "doses" of "medicine" were taken, or what were the effects produced. They might have been taken by all the jury, and some of them might have been under the influence of the intoxicating dose. A man who drinks at all, is liable to drink too much, particularly when cribbed and confined to a jury-room day and night. The prisoners were unable to ascertain the extent of the drinking, inasmuch as it has been settled by this court, and very properly and wisely too, that no juror shall be allowed to testify to his own wrong, to "impeach his verdict." But will it be contended that a prisoner's life or liberty shall be endangered; that the inalienable right which the Constitution gives him, to be tried by twelve good and lawful men,

shall be wrested from him, because of his inability to show that the verdict is corrupt, when he shows, from the natural tendency of things, that it might have been corrupted? They show that the means of corruption were in the reach of the jury—sent for by one of their members. This seems to us to be sufficient. From the nature of things, they could not show more. If spirituous liquors were allowed to circulate in a jury-room; if jurors, through real (as in this case it was) or pretended sickness, are allowed to send a bailiff and get liquor in any quantity, without the knowledge or consent of the court, we can see no reason why they may not be allowed to introduce anything they please into a jury-room. In our opinion, it ought not to be allowed. The trial by jury is justly regarded by the wisest and best of men as the great palladium of civil liberty, and its purity, even as to the forms intended to protect it inviolate, should be scrupulously guarded against every possible encroachment.

We will refer the court to a few adjudicated cases upon this point, which seem to us sufficient to settle this matter. In the case of The People v. Douglass, 4 Cowen, 26, the court holds the following language: "Drinking should not be tolerated in any shape in a jury, during the progress of the trial; and we have uniformly held that it vitiated the verdict in a civil cause, even where the liquor was given to the jury by consent. It may not do to weigh and examine the quantity which may have been taken by the jury, nor the effect produced. In this case it is not at all probable that either of these jurors was the least under the influence of strong drink; but being doubtful whether they may not have drunk something, we ought not, especially in a case of life and death, to sustain the verdict." In this case the court deliver their opinions *seriatim*. Mr. Justice Sutherland says: "There is no difference among us that the mere fact of drinking spirituous liquors is enough to set aside the verdict. It will never do to hold a rule short of this: that when any one of the jury, in the course of the trial, drinks spirituous liquor, we will set aside the verdict on this ground alone. * * * * * Where there is the slightest suspicion of abuse, their verdict should be set aside." *Vide* also Rose v. Smith, 4 Cowen, 19.

In the case of Brant v. Fowler, 7 Cow., 562, the court says,

"We cannot allow jurors thus of their own head to drink spirituous liquors while engaged in the course of a cause. We are satisfied that here there has been no mischief; but the rule is absolute, and does not meddle with consequences. Nor should exceptions be multiplied."

In this case the juror made affidavit that he took the brandy to check a diarrhœa, yet it was held that the verdict should be set aside. This, too, was a civil cause; and we may again ask, if it be important to guard the trial by a jury with so much strictness and vigilance in a civil cause, how much more important is it to enforce the rule in a criminal cause? But it may be said that this last case has been overruled in the same court, at a subsequent sitting, under the administration of different judges. 1 Hill, 207. True, it was to some extent. But it seems to be upon the ground that it was admitted that no mischief was done. In the case before us nothing is admitted; the prisoners waive no right. From their position—being in the custody of the officers of the law, and excluded from any opportunity to search out the facts—they were utterly unable to show to what extent the drinking was carried, or whether it operated injuriously upon the final result or not. All they were able to do was to show that an unauthorized act had been done by the jury, that the means of corruption had crept into their midst, and that the verdict might have been tainted with corruption. This they have shown. Can any one say that they have not suffered by the misconduct complained of?

In the case of Kellogg v. Reed & Wilder, 15 Johns., 455, both parties were allowed by the justice to treat the jury to a bottle of whiskey, "to enable them to listen to the remarks of counsel;" and although the court reverse the judgment on a different ground, still they say that it was gross misconduct in the justice to permit the use of spirituous liquors at the trial, to which the consent of parties affords no excuse."

In the case of Gregg v. McDaniel, 4 Harring., 367, the verdict was set aside for the introduction of intoxicating liquor into the jury-room. Not having the reports before us (only the syllabus), we do not know the character of the case or the extent of the drinking. But it appears that the verdict was set

aside simply for the introduction of the liquor into the jury-room.

Anciently it was the rule to swear the officer who had the jury in charge to "keep them without meat, drink, fire, or candle." This rule in modern times has been greatly modified and relaxed; but certainly it will not be contended that because this modification has taken place, that the bailiff in charge will be permitted to introduce into the jury-room, at his pleasure, or at the pleasure of any member of the jury, whatever species of refreshment may be desired. The rule was relaxed in order to secure to all parties interested in the result of a cause a fair and impartial trial, without compelling the jury, or any member of it, to suffer for those refreshments absolutely essential to render him comfortable. It was thought that a proper relaxation would inure to the benefit of all parties, and add to the security of jury trials. But then it was never intended that it should be allowed save through the knowledge and by the consent of the court. The court, it was thought, would judge of what was right and proper for each individual case. If it is understood that any member of a jury, through the plea of sickness, may introduce into the jury-room, without the knowledge or consent of the court, spirituous liquors, may it not be feared that by such conduct the confidence which is now universally reposed in jury trials will be poisoned? It will not do to say that jurors and officers thus violating their duty render themselves amenable to the severest possible punishment, which should in every case be rigidly inflicted; for, although it may deter offenders from a repetition of the offense should the opportunity again be offered, still it affords no redress to the unfortunate party who may, nevertheless, have been wronged. Suppose, for illustration, that instead of introducing a bottle of liquor into the jury-room, the bailiff had allowed a physician to enter. Would it be contended for a moment that, under such circumstances, the verdict should stand? We think not. And why? Because the opportunity for tampering—the door against corruption, would thus be opened. In this case it would not be necessary for the prisoner to show that tampering had actually taken place. It would be sufficient for them to show that the oppor-

tunity was offered, from which the law would presume that it might have been done. In the case before us, it seems to us that where the prisoners have shown an irregularity has taken place, that an unauthorized act has been done; that the means by which the fountain of justice might have been corrupted was in the midst of the jury; that it is sufficient to set aside the verdict. In the language of Judge Gaston, in a similar case, "The irregularity is confessedly against the law; it impresses on the verdict the stamp of legal suspicion; that impression is not removed; and until it is removed, the law will not found a judgment on what it reprobates and distrusts." We also refer the court to the case of Riggs v. State, 26 Miss., 55.

For either of the grounds suggested in the motion, we think the verdict ought to be set aside and a new trial granted. As it now stands, it does not, and can not, by any possibility, command that confidence and respect which verdicts of a jury should inspire. Such practices, either on the parts of jurors or officers, should never receive the sanction of courts. This mode of trial being justly regarded, when pure and uncontaminated, as the great bulwark against injustice and oppression—as the strongest security to the rights and liberties of the citizen, which human ingenuity and sagacity have ever devised, should be guarded with the strictest vigilance; and "where there is any partiality of the proceedings, inasmuch as there can be no certainty that the verdict has been influenced, the proper mode of correction and relief is by undoing what is thus improperly, and may have been corruptly done, or where the irregularity consists in doing that which may disqualify the jurors for proper deliberations and exercise of their reason and judgment, as where ardent spirits were introduced, then it would be proper to set aside the verdict; because no reliance can be placed on its purity and correctness."

T. J. Wharton, for the state, filed an elaborate brief, in which he cited and commented on the following authorities:

1st. On the part of the communication made by the bailiff: Hare's case, 4 How., 187; McQuillen's case, 8 S. & M., 596; Lewis' case, 9 ib., 121; Boles' case, 13 ib., 402; McCann's case,

9 ib., 469; Nelm's case, 13 ib., 508; Ned and Taylor's case, 33 Miss., 370; 6 Serg. & R., 577; 3 Rawle's R., 498.

2d. As to the effect of introducing intoxicating liquors into the jury room: U. S. v. Gilbert, 2 Sumner R., 83; Stone v. State, 4 Humph., 27; Brant v. Fowler, 7 Cow., 562; McLain v. State, 10 Yerger, 241.

SMITH, C. J.:

This was a conviction in the circuit court of Oktibbeha, under an indictment for grand larceny. A motion was made to set aside the verdict, and to grant a new trial, which was overruled, and exceptions taken. The errors alleged to have occurred in the trial relate to this action of the court.

It appears, from the bill of exceptions, that after the jury had retired from the court to deliberate upon their verdict, and before they had agreed, the bailiff, to whose charge they were committed, said to them that "unless they decided the case one way or the other, they should have nothing more to eat, and no water to drink." This communication was made without authority, and was intended as a jest. Some of the jurors so understood it. Others, however, although not so informed, appear to have been under the impression that the bailiff acted by order of the court. This conduct of the officer is assigned as the first ground in support of the motion. And it is insisted that the declaration which he made to the jury, under the circumstances, had, or might have had, an effect upon them prejudicial to the accused.

The conduct of the bailiff was improper and illegal. It was in violation of the express language of the statute, Rev. Code, 504, Art. 156. But the immediate question to be considered is not whether the officer was guilty of a violation of the law, but whether the communication made to the jury was calculated to have an influence upon their deliberations prejudicial to the parties on trial. For it is not now to be controverted, that it is not every improper or illegal act of the officer in charge of the jury, or of the jurors themselves, which will constitute just cause for setting aside the verdict.[1]

[1] The general rule is that the verdict will not be set aside on account of the misconduct or irregularity of a jury, even in a capital case, unless it be such as might affect

Was there an impression upon the minds of the jury which would improperly influence their verdict, the natural or necessary effect of the declaration made to them by the bailiff? If it were not calculated to produce such an effect, there can be no pretense for asserting that for this cause a new trial should be granted.

An officer placed in charge of the jury, under these circumstances, has no authority to furnish them with food or drink of any description whatever. If he should do so without the express command of the court, it would be a palpable violation of his duty. Whether, therefore, in this instance the jury were supplied with refreshments or not, did not depend on the volition of the bailiff. And the supposition is not to be indulged that either the officer or the jury was ignorant of the law. It cannot, therefore, be assumed that the declaration of the bailiff that the jury should have no more food or water unless they decided the case one way or the other, if understood to be made without authority from the court, could have had the least influence upon their deliberations. And it will not be contended that if the bailiff acted by authority, there is just ground for suspecting the purity of the verdict. But admitting, for the purpose of argument, that the jury in fact believed that it depended solely on the will of the bailiff whether they were furnished with refreshments or not, it is not readily perceived in what way the communication of the bailiff could have influenced the verdict either for or against the accused. It might furnish a motive which would accelerate a concurrence of the jury; and, going farther, and admitting that the motive thus presented might be sufficiently potent to overcome their convictions of guilt or innocence of the accused, it is nevertheless manifest that its tendency would not be greater to produce a concurrence as to his guilt than as to his innocence. Indeed, it may be safely assumed, that if such a motive is allowed to have place

their impartiality, or disqualify them for the proper exercise of their functions. Com. v. Roby, 12 Pick., 496, 519; People v. Douglass, 4 Cow., 26; State v. Babcock, 1 Conn., 401; State v. Prescott, 7 N. H., 290; Beebee v. People, 5 Hill, 32; Tooel v. Com., 11 Leigh, 714; Martin v. Com., 17 Leigh, 745; McCarter v. Com., 11 Leigh, 633; Rex v. Woolf, 1 Chitty, 401; Stone v. State, 4 Humph., 27; Whitney v. State, 8 Mo., 165; State v. Fox, 1 Geo. Decis, 35; State v. Peter, ib., 46; State v. Barton, 19 Mo., 227; State v. Igo, 21 Mo., 459.

in the breast of a juror, it would operate generally in favor of the accused, particularly in prosecutions where the death penalty is attached to a conviction. For we can scarcely imagine a human being so depraved, who, placed in the supposed alternative, would not consent to the escape of a felon more readily than he would agree to become the judicial murderer of one whom he believed to be innocent. Anciently, at common law, after the jury were charged, and had left the court to consider of their verdict, they were kept together, without communication with others, and without refreshments of any kind. These rules are still, with more or less rigor, enforced in several of the states of this confederacy. In this state they have been greatly relaxed, particularly in regard to the supplying of juries with proper refreshments after they have been charged and placed in the keeping of an officer. We do not question the policy of the modification which has been introduced. But it is certain that they have not proceeded from a conviction in the minds of our legislators that in prosecutions for felonies the rule at common law, which excluded the jury, during the hours of its deliberations, from all refreshments, tended to produce improper convictions. And in view of all the rules which have been adopted for the purpose of insuring impartiality in the verdicts of juries, the suggestion is a novel one that the purity of the verdict is to be suspected if the jury deliberate under the impression that they are not to be furnished with refreshments. Upon the whole, we are well satisfied that this ground for the motion was untenable.

It appears, further, that, at the suggestion of one of the jurors, who was a physician, the bailiff carried "liquor" in a bottle into the jury-room for another one of the jurors, who was sick. This was done without the knowledge or permission of the court. The juror who was sick drank of the "liquor." The bailiff did not see any other person drink, but did not know that no one else drank. The bottle of liquor was in the room a very short time, during which the bailiff was present, who carried the bottle with him.

Drinking, in any shape, is not to be tolerated in a jury, during the progress of the trial. The conduct and acts of the

juror, as well as those of the bailiff, were, therefore, highly reprehensible. But the true point of inquiry here is not whether these parties were guilty of improper and illegal conduct, but whether, by such conduct, the verdict was improperly influenced. If, indeed, the evidence closed with the proof of the naked fact that ardent spirits, in quantities sufficient to produce intoxication, were conveyed by the officer into the jury-room, we should feel no hesitation in holding that the conviction should be set aside. Upon such proof there would be ground for suspecting the purity of the verdict. And where facts are established which show that improper influences might have been brought to bear upon the jury, and there is no opposing testimony which negatives the presumption thus created, according to the settled rule of this court the verdict will be deemed vicious. Hart's case, 4 How., 192; McCann's case, 9 S. & M., 469; Organ's case, 26 Miss. R., 78; Ned and Taylor's case, 33 ib., 370. The rule applicable in all cases of this character, and which has been uniformly recognized in this court, is laid down in McCann's case, above quoted, as follows: "The evil to be guarded against is improper influence; and where an exposure to such influence is shown, and it is not shown that it failed of effect, then the presumption is against the purity of the verdict."

The evidence in regard to this point, we think, clearly shows that no effect could in any way influence the verdict resulted from the introduction of the bottle of "liquor" into the jury-room. The officer does not in express terms state that no juror except the sick man drank of the brandy. But as he remained in the room during the whole time the bottle was there, which was a very short time, and did not see any other juror drink, such is the effect of his testimony. Under these circumstances, notwithstanding the irregular and improper conduct of the bailiff and the juror, there is no pretense for asserting that the verdict should be disturbed.

There is another point made upon the introduction of the jurors as witnesses on the trial of the motion for a new trial. It is not to be questioned that their testimony was incompetent. Organ v. State, 26 Miss. R., 83. But as the presiding judge did

not see proper to prevent their examination, and as no exception was taken to the introduction of their testimony, we cannot notice the objection.

Judgment affirmed.

HARRIS, J., gave no opinion, having presided on the trial of the case in the court below.

MOORE v. STATE, 36 Miss. R., 137.

HOMICIDE.

A prisoner has a right to a writ of error to revise a judgment on habeas corpus refusing him bail.

In determining in this court that a prisoner shall or shall not have bail, the court does not mean to prejudice his case so as to influence a jury who may afterwards try the issue of his guilt. He may be refused bail, and afterwards acquitted; or granted bail, and afterwards convicted of murder.

A jury may, and perhaps ought, in some cases, to find the defendant guilty of murder, even after this court has allowed him bail.

This was a writ of error prosecuted to revise the judgment of the Hon. John Watts, a circuit judge, rendered in an action refusing the prisoner's application for bail.

The substance of the evidence appears to be:

That the prisoner was the owner and keeper of a grocery in Scott county; and that his brother, Benjamin Moore, was employed by him as assistant and clerk. That the deceased (Johnson) lived very near the grocery, about one-quarter of a mile distant, and was in the habit of frequently visiting that place, where he usually got drunk, and when drunk, behaved in a violent and insulting manner towards the Moores and their customers. It was proven that about two weeks before he was killed, Johnson was at the grocery, got drunk, attacked Benjamin Moore violently, seized him by the collar, and endeavored to drag him across the counter of the grocery, and made an effort to cut him with his knife. About this time, Benjamin Moore said to a witness, "that the way Johnson is going on with me will never do, and it has to be dried up,

or he will get killed, and I am the man to do it." B. Moore then showed the witness a knife, and some other weapon, and further told the witness that Johnson had attacked him that evening at the grocery with his knife, as before stated.

On the day of the killing, Johnson (the deceased) came to the grocery in the morning, very soon after breakfast; he soon afterwards got drunk, and became noisy and insulting. He cursed a good deal, and jumped with his feet on an old man who was there, and who had said or done nothing to him. Some of those present interfered, and he threatened to hurt them if they did not desist. He sang a vulgar and obscene song; and old Mr. Moore, the father of the prisoner, requested him to desist. He then commenced cursing and abusing him. Ben. Moore then came up, and Johnson rushed at him, and caught him by the collar. Ben. Moore pushed him off, and told him to "stand off," or he would kill him. Ben. Moore then went off some forty or fifty yards, and sat on a log. His father persuaded him to leave the grocery, and go home. He replied to his father, "that his brother had hired him to attend to his business, and he did not intend to be run off by anybody." It was then proposed by some one present that Ben. Moore and Johnson should make friends. To this Ben. Moore assented, and he and Johnson drank together, and shook hands. Ben. Moore then went out of the grocery, and Johnson began cursing him again, and advanced on him, when B. Moore drew his gun, and told him to "stand off, or he would make him sick." The prisoner and others prevented them from fighting.

The prisoner and one of the witnesses then persuaded Johnson to go home, and he said he would, if the witness would bring him his mare, saying that his mare had taken him out of several "scrapes," and "she had to take him out of another yet." Johnson got on his mare, and started in the direction of his residence, but soon turned and galloped off in a different direction, saying that "he would be d—d if he didn't go and prepare himself, and come back and drive the last Moore from Pea Ridge, or lose his life in the attempt." The prisoner halloed to Johnson "that if he did so, he would arm himself too." The prisoner then went to a neighbor's house near by, and got

a rifle, and was seen at the grocery when he returned, but was not noticed by any of the witnesses afterwards, until just after Johnson was shot, as will be hereafter related. Ben. Moore had a gun during the whole day; and one of the witnesses stated that he had loaded it to shoot at a mark with witness; but it was not proven he so shot it at a mark. After Johnson left, Ben. Moore was noticed by the witnesses in the road in front of the grocery, but it does not appear when he took the position he occupied when he shot Johnson; nor does it appear how long a time intervened between the departure of Johnson and his return. After Johnson left, he was seen by a witness, to whom he said: "I want to kill somebody," and then he rode on towards Moore's grocery. This seems to have been prior to the time he was at a brick-yard not far from Moore's. While at this brick-yard, he asked witness to load a Colt's repeater for him, which was done; he said he wanted to shoot it at a mark, but stated that he had no caps. Two witnesses for the state passed the brick-yard just before the killing, and saw Johnson sitting down, with his head resting on his hands. These witnesses were going in the direction of Moore's grocery; and soon after they passed the brick-yard, Johnson galloped up to them, and asked one of them where in the h—l he was going; he said "he was in a difficulty down yonder." He drew a Colt's repeater from his side, held it up, and showed it to the witness. About this time, the witness and Johnson came to a neighborhood road, which led from the main road to Johnson's house, and witness persuaded Johnson to take that road and go home. He refused to go, and held up his pistol, and asked witness if he thought he was a coward; said he would give him two dollars for a box of caps, and asked witness if he had any. (From this point to the fork of a main road, and the road leading to Johnson's house, to Moore's grocery, is one-quarter of a mile, and about the same distance to Johnson's residence, and also about that distance from Johnson's to Moore's by another road; so that it is twice as far from the fork to Johnson's by the route by the grocery as by the road there leading off to Johnson's.) The two witnesses and Johnson then proceeded in the direction of Moore's, the witnesses walk-

ing, and Johnson riding. When they arrived in sight of the grocery, about one hundred and thirty yards from it, a gun fired in the direction of the grocery, and Johnson complained of being shot. The witness helped Johnson from his mare, and he saw Ben. Moore between them and the grocery, near the road-side. He was about sixty yards from the grocery, and about seventy from the witnesses. He was not concealed; the woods were open, and the trees had been "deadened." Soon afterwards he got in the road and loaded his gun. "Very soon after the gun fired," one of the witnesses "saw the prisoner run into the road nearly opposite to where Ben. Moore stood;" the prisoner came running up to where witness and Johnson were; he raised his rifle, and told witness to stand out of the way, or he would shoot him; witness got out of the way, and as he approached Johnson, the latter told him that he (Johnson) was already shot enough, and requested him not to shoot him. Prisoner immediately turned around and walked towards the grocery. Soon afterwards, as witness was passing the grocery on his way home, the prisoner requested him to go back with him to the place where Johnson was, and see if anything could be done for Johnson; witness and prisoner went up the road and found Johnson's saddle, and not seeing him, they supposed he had gone home, and they went no further. This witness, on cross-examination, stated that when he saw prisoner come into the road, after the shooting, his (prisoner's) back was towards the grocery.

Another witness for the state stated that he was about one hundred yards from the grocery, in an opposite direction from Johnson, when he heard the gun fired; that the house did not intercept his view, and he saw Johnson put his hand to his body when he was shot. "At the same time he saw the prisoner go towards the place (where Johnson was); he had some children with him."

It was proven by witnesses for the prisoner that the prisoner went to see Johnson after he was shot, and lying a short distance from the road, under a tree. The prisoner's manner to Johnson was kind. He gave him his hand, saying "he had nothing against him, 'but a brother is a brother.'" Prisoner

asked Johnson if he should send for his wife. Johnson assented, and prisoner procured one of the witnesses to go after her.

It was proven by two witnesses for the state that, on the succeeding night (Johnson being dead), the prisoner came to the house where the dead body was, and said: "It was a bad business, but, as it had to be, he was glad it occurred as it did; and that he would like to know the man who loaned the pistol."

Several witnesses who were present at the grocery when Johnson left, a short time before he was shot, as before related, stated that his manner was violent, that they anticipated he would return armed, and that there would be shooting, and, therefore, they left.

Ben. Moore was proven to be about twenty-one years old, and sickly and very weak. Numerous witnesses, including most of those who testified for the state, concurred in the opinion that Johnson, when drunk, was a dangerous, reckless, and desperate man, and anxious and willing to fight with deadly weapons. Some of the witnesses related instances in which he exhibited his overbearing disposition by making unprovoked and violent attacks on persons in his company. It was also proven that, on the day he was killed, he asked a witness, who was about to leave the neighborhood, to take a drink with him, saying "that he never expected to see him again, as he anticipated that he would either kill somebody or be killed before Christmas."

It was also shown that the prisoner had very little property, and was in bad health, which would be further endangered by confinement in prison.

The circuit judge refused bail to the prisoner, and he sued out this writ of error.

T. P. Ware, for plaintiff in error.

T. J. Wharton, attorney general.

HARRIS, J.:

This case was presented to us originally on a petition for a writ of error, to revise the judgment of the circuit judge in vacation, refusing to allow the defendant bail, the late act of the legislature having made the writ of error in criminal cases, in

this respect, a writ of right. The case is now submitted to us on the error assigned.

On examination of the evidence in the cause, now appearing on the record, we think it perhaps most consistent with the liberal policy of our Constitution and laws to allow this application for bail. We refrain from any comment on the testimony, or the expression of any opinion as to the guilt of the accused, or the degree of the offense. We do not intend to intimate an opinion that he may not be guilty of murder, or that he may not be wholly innocent. This will be the province of the jury who shall hear the evidence. We wish it understood that, on application for bail, we may grant the application even in cases where a jury might and perhaps ought, on the same evidence, to render a verdict of guilty of murder.[1] So much depends on the incidents of a trial by jury, the manner of the witnesses, their intelligence, their seeming bias or fairness, that cannot be brought before this court, which yet should have a material bearing on the weight of evidence, that we deem it unsafe that the opinion of the high court in granting or refusing bail should be adopted as a criterion for the jury by which to determine the guilt or innocence of the accused.

Let the judgment below be reversed, and the defendant admitted to bail, upon his entering into recognizance himself in the sum of two thousand dollars, with two good securities jointly and severally in a like sum, to be entered into before the sheriff of Rankin county, Mississippi. This sum is fixed by this court, upon proof of the insolvency of the prisoner.

PRICE *v.* STATE, 36 Miss. R., 531.

ASSAULT AND BATTERY WITH INTENT TO KILL.

Where a person prepares and conceals a deadly weapon, before entering into a fight which he provoked, with the determinaion of using it, if necessary, in the fight, it is evidence of malice, which, if he kill his antagonist, would constitute murder. Roscoe Cr. Ev., 738; Rex v. Kessal, 1 C. & P., 437; 2 Archb. Cr. Pl. and Ev., 224-1.

[1] This case, together with the cases of Wray and Beall, are fully considered in the opinion of the court in the case of Street v. State, where the doctrine above laid down is overruled. See 43 Miss. R., 1.

"If a party enters into a contest dangerously armed, and fights under an undue advantage, though mutual blows pass, and kills his adversary, it is not manslaughter but murder." Per BAILEY, J., in Whitley's case, 1 Lew. C. C., 178; Rosc. Cr. Ev., 739; Archb. Cr. Pl. & Ev., 224.

The verdict of the jury, in cases of felony, must be delivered in open court, and in the presence of the defendant. But if the defendant is absent from the court, as his own voluntary act, he cannot take advantage of his absence. His voluntary absence must be taken as a waiver of his right to be present. Hence, though the verdict is irregular in this respect, he cannot take the benefit of his own illegal act.

The power to discharge the jury is a matter within the sound discretion of the court, to be exercised whenever the ends of public justice require it; and such discharge will not bar a subsequent trial and conviction. Hence, where, at a former term, the jury disagreed, and were discharged by the court, it is no ground of error.

The constitutional rule, that no person shall be twice put in jeopardy of life or limb for the same offense, means that he shall not be again tried for the same offense, after he has been once convicted or acquitted.

Where the reasons and circumstances upon which the court discharged the jury do not appear, it will be that it was done legally.

Instructions are not a part of the record; and unless they are embodied in a bill of exceptions, they will not be noticed on error.

Error to Pike circuit court. MCNAIR, J.

William Price, the plaintiff in error, was indicted and convicted in the court below, of an assault and battery on one Judge M. Hart, with intent to kill and murder said Hart. He made a motion for a new trial, on the following grounds:

"1st. Because the verdict is contrary to law and evidence.

"2d. Because the court erred in giving the following instruction, viz.: 'Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse.'

"3d. Because the court erred in putting defendant's witnesses under the rule.

"4th. Because the verdict of the jury was returned into court while the defendant was absent, and the jury were discharged before the defendant had an opportunity of polling them."

He also moved an arrest of judgment—

1st. Because the verdict was returned during his absence.

2d. Because the court, at the last March term, discharged the jury when there was no necessity, and against the consent of defendant.

Both of these motions were overruled, and the defendant tendered his bill of exceptions, which contains the evidence introduced on the trial of the indictment, and sets out the above motions, and the evidence introduced on the hearing of said motions.

On the trial of the indictment,

Judge M. Hart, the prosecutor, testified for the state, that on the night of the 31st of December, A. D. 1857, he, with others, were at William Brown's, at a ball or party; that he and others had been requested by Mr. Brown to see that order and proper decorum were observed; and about dark the prisoner and some others arrived; and after being in the house a short time, the prisoner and others commenced "shuffling on the floor as if dancing." J. E. J. Hart (a brother of witness), and one of the persons appointed to see that order was kept, called the prisoner and one Hodges out of the room. Witness heard his brother (J. E. J. Hart) call him three times. After waiting a little, he went out into the yard, where J. E. J. Hart and Hodges were engaged in a quarrel. Hart was stripped to the shirt. Just as witness entered the crowd he heard some person say, "By God, Hodges, I am here." Witness supposed it was the prisoner that spoke, and witness turned to him and said, "Price, I thought you were more of a gentleman than to act as you are, or have acted, in shuffling over the floor, using bad language, and getting in the way of those engaged in the dance." Price replied, "What have I done?" Witness again repeated in substance what he had just stated. Price denied it. Witness then remarked to him, "Go into the house and get you a partner, and act or dance like a gentleman." Price said he had not acted ungentlemanly. Witness insisted that his conduct was wrong; and Price then remarked, "That witness could not whip him." Witness replied, "As to whipping him, he could do it faster than Price could get up." Price then stepped up to witness, and said to him: "You are a d—d liar; and if you think you can whip me, pitch in." Witness stepped back so as to get room to strike, and struck Price, knocking him back some distance. At that time some person pulled witness' coat-tail. As soon as the blow was given, witness advanced, and was met by Price, when the fight was resumed by witness and commenced by Price, both parties striking about the same time. Price struck "overhanded," and with the first blow cut witness on the right side of the face. Witness saw no knife in the hands of Price. They fought for some

time before they were separated. After being separated, witness discovered that he was wounded twice in the arm, two small marks on the neck, and a large wound on the face; witness' coat, pants, and vest were cut in several places.

Joseph E. J. Hart, for the state, testified that he was at the party at Brown's, and was, with others, requested by Brown to see that order was kept. Shortly after the dancing commenced Price and others came in, and some of them commenced shuffling or dancing about the fire-place. Witness requested Price to walk out into the yard. They went out; and whilst he and Price were talking, Hodges came out, and about that time a quarrel commenced between witness and Hodges. Witness pulled off his coat for the purpose of fighting Hodges, and about that time McLendon told witness he was too large to fight Hodges, and to try him. Witness then called his brother, Judge M. Hart, asking him to come out and try and make peace. After Judge M. Hart came out, "he and Price got into high words;" but witness does not recollect what was said; but he recollects that Price called Judge M. Hart a d——d liar, and told him if he thought he could whip him to pitch in. Hart then struck Price, and at that time he observed that Price had his right hand in his bosom. Witness saw nothing more of the fight until about the time they were parted, when he observed Hart was bleeding from the cut on the right side of his face, as though his throat had been cut.

Cross-examined.—Witness did not strike or kick Price during the fight, nor did Judge M. Hart, immediately after the fight, accuse witness of being the cause of it.

Judge A. Hart, for the state.—Witness is a son of J. E. J. Hart, and nephew of Judge M. Hart. He was at the party at Brown's. Shortly after Judge M. Hart came from the house into the yard where Price and others were standing, he and Price got into a quarrel; and whilst thus quarreling, witness (who was standing behind Judge M. Hart) saw Price take out a black-handled knife, open it, and "put it into his side-pocket in his coat, or some place in his clothes about his breast." During the quarrel Price stated to Judge M. Hart that he (Hart) "was a d——d liar, and if he thought he could whip

him to pitch in." As Judge M. Hart was about striking, witness caught him by the coat-tail and tried to hold him back, and he told those standing around that Price had a knife; but there was so much noise, he supposes no one heard him. No one interfered in the fight so far as witness saw. After the fight was over, witness saw a knife that was picked up by Mr. Prestridge, but he does not know to whom it belonged.

Samuel Prestridge, for the state.—After the fight had ceased, he found a large pocket-knife, which was exhibited on the trial. Witness would call the knife a deadly weapon. There was some blood on it when found by witness, and the point was bent, as if it had been struck against a hard substance. Hart was severely cut on the right cheek; there were also some cuts on his arm, entering to the bone, and a scratch or two upon his neck; his clothes were also cut in several places.

Wilson Price, for the state.—About three weeks before the fight, he saw in the possession of the prisoner a knife, "of the kind and description of the one found by Prestridge after the close of the fight." He further stated that neither the prisoner nor Hodges nor the McLendons were invited to the party at Brown's.

For the defendant.—Laban Moke testified that he was at Brown's at the party. Saw Price in the room after the dancing commenced and when it was going on; saw him "do nothing out of the way;" "heard him make use of no improper language." Witness was in the room all the time Price was there, and saw him go out with J. E. J. Hart. About the time they left, Hodges also left. As soon as Hodges and J. E. J. Hart met in the yard a quarrel ensued between them. Hart pulled off his coat, and in a short time called three times for his brother, Judge M. Hart. When Judge M. Hart came out, he and Price and witness all met together. Hart commenced on Price, by accusing him of acting ungentlemanly in the room where the dance was going on. Price denied it; and Hart insisted that his conduct was bad. Price then remarked: "Judge, you cannot whip me." Hart replied: "As to whipping you, Bill Price, God d—n you, I can whip you faster than you can get up, or knock you down faster than you can get up."

To which Price replied: "You are a d——d liar, and if you think so, pitch in." Hart stepped back and struck Price, and knocked him back eight or ten feet. The parties then advanced, clenched, and fought for some time, and until they were separated. When the quarrel and fight commenced, witness was standing between Hart and Price, and near enough to put his hand on either of them. He saw no knife, and no attempt to draw a knife. Saw Hart immediately after the fight, and he was severely wounded. Witness is a justice of the peace, and friendly to both parties.

James McLendon, for the prisoner, stated that he was at Brown's party, and in the house when the dance was going on, and whilst Price and Hodges were in the room. "Saw Price do nothing wrong." Witness went out about the time J. E. J. Hart and Price went out. After J. E. J. Hart and Hodges commenced quarreling, witness told his brother, Samuel McLendon, not to engage in their quarrels. After J. E. J. Hart and Hodges had been quarreling some time, Hodges started to pull off his coat, and "Price spoke to him, and told him to keep on his coat; that neither he nor they could get a fair fight." Hodges kept his coat on. J. E. J. Hart and three other friends of his pulled off their coats. "Hodges and Price kept backing out or off," Price saying that he could not get a fair fight. Whilst J. E. J. Hart and Hodges were quarreling, Sam. McLendon interfered, and told Hart that he should not fight Hodges. About that time Hart called his brother, Judge M. Hart, some three times before he made his appearance. When Judge M. Hart came into the yard, he and Price met very near witness. As soon as Judge M. Hart saw Price, he remarked to him that "no gentleman would act as he had done." Price asked him what he had done. Hart replied "that he had danced about the floor to the interruption of the dancers." Price denied it, and remarked: "Judge, I am not afraid; and as to fighting, you can't whip me." Judge M. Hart replied: "God d—n you, I can knock you down faster than you can get up." Price replied: "You are a d——d liar; and if you think you can whip me, pitch in." Hart stepped back, so as to get room to strike, and struck Price, knocking him back

about ten feet. As soon as Price recovered, the parties met and commenced to fight; and they fought until they were separated. At the commencement of the fight, witness was near enough to the parties to have put his hand on them. He saw no knife, nor any attempt to draw one. It was a bright moonlight night. After the parties were separated, he saw J. E. J. Hart strike and kick Price, saying he wished he could kill him. Soon after this, Judge M. Hart called J. E. J. Hart to him and said: "You, Joe, are the cause of this; you are always raising difficulties at every gathering you go to except church." Witness stated further, that he and Judge M. Hart were friendly, but that he and J. E. J. Hart were unfriendly.

Samuel McLendon, for the defendant, stated that he was at Brown's party; was in the house whilst Price was there; saw Price sitting in a chair and shuffling his feet on the floor, as if keeping time with the music. After Price and J. E. J. Hart left the room, witness went out and found Hart and Hodges quarreling. Hart had his coat off, and was offering to fight Hodges. Witness interfered, and offered to take the fight off Hodges' hands, for the reason that Hart was too large a man to fight Hodges. J. E. J. Hart and three other men friendly to Hart's side had their coats off. When witness proposed to fight Hart for Hodges, J. E. J. Hart then called some three times for his brother, Judge M. Hart. When the latter came out, he and Price got into a quarrel. They were some ten feet apart. Witness does not recollect what they said; saw Hart knock Price back several feet. They then clinched, and commenced fighting. "Witness rushed in," and after they had fought some time, J. E. J. Hart came up and kicked Price twice, and struck him once. The parties again got to their feet, and fought until Judge M. Hart said he was cut, when they were parted.

This was all the evidence for the defendant.

The bill of exceptions recites: "Other witnesses were introduced on the part of the state, some three or four, to rebut what had been testified to on the part of the defense, whose testimony was substantially the same as that on the part of the state, except none testified to seeing the knife in the possession of Price on the night of the fight. Here the testimony closed."

On the hearing of the motion for a new trial, the bill of exceptions recites: "That the defendant introduced the instruction mentioned in said motion, to prove that said instruction had been given." This is all the statement in the record, except what appears in the motion itself, in relation to said instruction, or any other.

Defendant also proved that at the time the verdict of the jury was returned into court, and the jury discharged, he was not present in court, and "knew nothing of the verdict at the time it was returned." But it was shown that the counsel of Price was present in court when the verdict was returned, "but did not know of the absence of the defendant;" and that defendant was under recognizance to appear "at the present term of the court."

On the hearing of the motion in arrest of judgment, the defendant read in evidence the minutes of the court at a preceding term, from which it appeared that, on Saturday, the 6th day of March, A. D. 1858, he had been arraigned, and pleaded not guilty to the present indictment; and that the cause had been regularly submitted to a jury, duly empaneled, &c.; and that, after hearing the evidence, they retired to consider of their verdict; and on the same day they came into court and reported that they were unable to agree upon a verdict. "Whereupon the said jury was dismissed, and the cause continued."

And it further appeared from said minutes that the court met again on Monday, the 8th of March, 1858.

From the judgment of the court overruling these motions, and sentencing him to confinement in the penitentiary for two years, the prisoner sued out this writ of error.

W. P. Harris, for plaintiff in error, made the following points:

1. The proof was insufficient to convict of an intent to murder. *Ex parte* Wray, 1 George, 673; Cotton v. State, 2 ib., 504.

2. In criminal cases the verdict cannot be rendered in the absence of the prisoner; he has the right to poll the jury. People v. Perkins, 1 Wend., 91; 1 Arch. Cr. Pl. & Pr. (by

Waterman), 173, notes 1, 2; Kelly v. State, 3 S. & M. 518; Dyson v. State, 26 Miss. R., 383. The Revised Code allows this to be done only by consent of counsel. See p. 662, art. 303.

3. The court had no authority to discharge the jury at the March term, 1858. Commonwealth v. Clue, 3 Rawle, 498; State v. Ephraim, 2 Dev. & Batt., 162; U. S. v. Haskell, 4 Wash. C. C. R., 402; Commonwealth v. Cook, 6 Serg. & R., 377; People v. Alcott, 3 Johnson's Cases, 301; Mahala v. State, 10 Yerg. 535; Whar. Cr. Law, 206, 207.

4. The instruction objected to on the motion for a new trial, was erroneous.

T. J. Wharton, attorney general:

1. The instruction objected to cannot be noticed by the court; it was not excepted to on the trial. Haynie v. State, 32 Miss. R., 401; Brown v. State, ib., 434; Scott v. State, ib., 473.

2. The prisoner was under recognizance, and it was his own fault that he was not present when the verdict was rendered. It was his duty to be present in court, and he cannot take advantage of his own wrong.

3. As to the power of courts to discharge jurors, when they cannot agree, and the effect of such discharge, there is a great diversity in the authorities; but the following sustain the power, and hold that its exercise does not relieve the prisoner, and they seem to be most consonant to reason. People v. Olcott, 2 Johnson's Cases, 301; People v. Goodwin, 18 John. R., 200; State v. Bowden, 9 Mass. R., 494; State v. Wood, 12 ib., 313; State v. Woodruft, 3 Day's Cases, 504; State v. Barnett et al., 2 Caines' R., 100; State v. Denton, 2 Johnson's Cases, 275; U. S. v. Perez, 9 Wheaton, 580; State v. Green, 13 Wend., 56, 2 Pick., 521; Stone v. People, 2 Scam., 326; Moore v. State, Walker's R., 134; U. S. v. Gilbert, 2 Sumner, 19; U. S. v. Shoemaker, 2 McLean, 114; U. S. v. Haskell, 4 Wash. C. C. R., 409; Wharton's Cr. L. (2d ed.), 205–213; 1 Arch. Cr. Pl. (6 Am. ed.), 171–173.

HANDY, J.:

The plaintiff in error was indicted and convicted of an assault, with intent to kill and murder Judge M. Hart.

After verdict, the defendant below made a motion for a new trial, on various grounds, which was overruled. He then moved an arrest of judgment, which motion was overruled; and the case is brought here upon exceptions taken to the action of the court in overruling these motions.

The first ground of the motion for a new trial, and the first error assigned is, that the verdict is contrary to the law and evidence.

Many witnesses were examined, both in behalf of the State and of the accused; and though there is some discrepancy between the respective witnesses in some particulars, the entire testimony warranted the jury in taking the following view of the facts of the case: that the accused had, in the opinions of the persons charged with the management of the *ball* or party at which the offense was committed, been guilty of a breach of decorum, in consequence of which he was called out of the room, by one of the persons authorized to keep order, and an altercation took place between that person and the accused and a person associated with him; during which, the person who called the prisoner out, called several times to Judge M. Hart, who was also one of the managers, to come out into the yard where the altercation was going on; that Hart went out, and said to the accused, that he thought he was more of a gentleman than to have acted as he had done in the room, to which the accused replied, denying that he had acted as Hart had alleged; and Hart said: "Go into the house and get a partner, and act or dance like a gentleman." The accused denied that he had acted in an ungentlemanly manner; and Hart insisted that his conduct was wrong; and the accused then said Hart could not whip him; to which Hart replied, that "he could whip him or knock him down faster than he could get up;" and thereupon the accused said, with an oath, "You are a liar; and if you think you can whip me, pitch in," stepping up to Hart; at which Hart stepped back for room to strike, and struck the accused, knocking him back several feet; and

the parties then met, and struck about the same time, the accused striking overhand, and at the first blow he cut Hart on the cheek; and after they had fought for some time, they were separated; Hart was found to be cut twice on the arm, with two small marks on the neck, a large wound on the face, and his clothes cut in several places. Hart testifies that he did not see any knife in the hands of the accused, and other witnesses in his behalf state that they saw none; but another witness states that, at the time Hart struck the first blow the accused had his right hand in his bosom. Another witness testifies, that while the quarrel between Hart and the accused was going on, he saw the accused take out a knife and open it, and put it in his side-pocket in his coat, or some place in his clothes about his breast; and another witness testified that, after the fight had ceased, he found a large pocket-knife, a deadly weapon, having blood on it; and it was also proved, that about three weeks before the fight, the accused had in his possession a knife of the description of the one found upon the ground, and spoken of by the last witness.

There is but little discrepancy among the witnesses as to the commencement of the altercation between the accused and Hart, and as to what took place between them immediately preceding and connected with the fight; and whether the accused was guilty of the improper deportment in the ball-room complained of or not, the testimony justified the jury in believing that Hart was acting in a proper spirit in his first remarks to the accused, and from a desire to have decorum observed on the occasion. It is also clear that the accused first exhibited a hostile disposition, and gave the first invitation to fight, and made the first advance toward Hart, amounting to an assault, which immediately led to the conflict. The testimony also fully warranted the belief that he prepared and secreted his knife, to be used in the fight, and that he did use it in a manner most likely to take the life of his antagonist.

Under these circumstances, the jury were authorized to conclude that the accused brought on the fight, and was, therefore, responsible for the use of the deadly weapon; and if, as the jury were warranted by the facts in believing, he prepared and con-

cealed the knife before entering into the fight which he provoked, with the determination to use it, if necessary, in the fight, that was evidence of the malice, which, if he had killed his antagonist, would have been murder.[1] Roscoe Cr. Ev., 738; Rex v. Kessal, 1 Carr. & P., 437; 2 Arch. Crim. Pl. & Ev. (by Waterman), 224–1. If the case be regarded as one of mutual combat, it is evident that the accused entered into it at unfair advantage, and having a deadly weapon concealed about

[1] Rex v. Kerrall, 1 C. & P., 437. In the case of Wray Ex parte, 30 Miss. R., 673, the prisoner armed himself with deadly weapons, with the avowed purpose of seeking an explanation from a school-teacher (who had expelled from his school a brother of the prisoner), but declaring that he would not use them unless the school-boys should render it necessary by interfering against him; he soon afterwards met the teacher, when hot words passed, and the prisoner struck the deceased with his fist, and the latter thereupon assaulted the prisoner with great violence, and pursued him while he retreated; the prisoner then drew his weapon for the first time, and killed the deceased. The court, per FISHER, J., held that the circumstance of arming himself, and going into the struggle armed, together with the fact of his being fiercely assaulted by the deceased, did not raise the presumption of malice sufficient to constitute murder. HANDY, J., dissented from this opinion of the court, and, in very elaborate and masterly argument, sustains the position which the court have taken in the case of Price *supra*. He says: "I take the rule to be sound and well established, that whenever a party, having previous malice, provides himself with deadly weapons, intending to use them, if necessary, in a conflict, *and he provokes the conflict*, and uses the weapons, and kills his adversary, it is clearly murder. Roscoe Cr. Ev., 724. * * * * * But it is said that the killing is extenuated, because in the conflict he was hard pressed by the blows of the deceased, and only resorted to his weapon to defend himself against the fierceness of his adversary's blows; that the killing must be regarded as the result of that *furor brevis* produced by the violence of the assault upon him, and cannot be ascribed to the original malicious purpose shown by his conduct." The true doctrine on this subject is laid down by Roscoe thus: 'It frequently becomes a most important question, in the proof of malice, whether the act was done under the sudden influence of such a degree of provocation as to reduce the crime from murder to manslaughter. The indulgence shown to the *first transport* of passion in these cases, says Mr. Justice Foster, is plainly a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders the man deaf to the voice of reason. The provocation, therefore, which extenuates in the case of homicide must be something that the man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed, or what time and accident may afterwards bring to light. Whenever death ensues from sudden transport of passion, or heat of blood, *if upon a reasonable provocation* and *without malice*, or if upon a sudden combat, it will be manslaughter; if without such provocation, or if the blood has had time to cool, or *there be evidence of express malice*, it will be murder; *for in no instance can a party killing allocate his case by referring to a previous provocation, if it appear by any means that he acted upon express malice. When the provocation is sought by the prisoner, it cannot furnish any defense against the charge of murder.*'" Roscoe Cr. Ev., 724; State v. Hill, 4 Dev. & Batt., 491. "To save the party making the first assault, upon an insufficient legal provocation, from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be upon an equal footing in point of defense, at least, at the outset." Roscoe, 738; Wharton's Am. Cr. Law, 950, 953; State v. Lane, 4 Iredell, 113; 1 Hale, 451; State v. Ferguson, 2 Hill's S. C. R., 619; Wharton on Homicide, 38, 180, 197; Jones v. State, 14 Mo., 409; Roberts v. State, 14 Mo., 138; State v. Johnson, 1 Iredell, 354; State v. Tilley, 3 Iredell, 424; Stewart v. State, 1 Ohio, 66; State v. Martin, 2 Iredell, 101.

his person, ready for use, and which he did use. It is immaterial in such a case who gave the first blow; for the party challenged to fight is warranted in believing that his adversary will fight without the use of deadly weapons, unless such weapons are open to view, and so exhibited as to put him on his guard that they will be resorted to. The rule in such cases is, that "if a party enters into a contest dangerously armed, and fights under an undue advantage, though mutual blows pass, and kills his adversary, it is not manslaughter, but murder."[1] Per Bailey, J., in Whiteley's case, 1 Lewin C. C., 173; Roscoe Crim. Ev., 739; Archb. Crim. Pl. & Ev., 224.

It is therefore manifest that the jury were justified in considering the conduct of the accused as dictated by malice, and without justification; and there is no just ground for this assignment of error.

The next ground for a new trial, and which it is here insisted should have been sustained, is, that the verdict was returned into court by the jury while the defendant was absent, and the jury was discharged before it had an opportunity to poll the jury.

In support of this ground of the motion, the record shows that it was proved that, at the time when the verdict was returned into court, and the jury was discharged, the accused was not present in court, and knew nothing of the verdict, though his attorney was present at the time; and that the defendant was under recognizance to appear at that term of the court. It also appears that the accused was present in court at the commencement of the trial.

The general rule is, that the verdict, in cases of felony, must be delivered in open court, and in the presence of the defendant. 1 Chitty Cr. L., 636. This rule is founded on two reasons: First, the right of the defendant to be present, and to see that the verdict is sanctioned by all the jurors; and, secondly, in order that the defendant, if convicted, may be under the power of the court, and subject to its judgment. The right of the defendant to be present depends upon the presumption that he is in custody, and has no power to be present unless ordered

[1] See cases cited in note (*) *supra*.

by the court to be brought into court. But, under our law, he may waive that right. If he is not in custody, so as to be deprived of the power to attend, it would seem that the reason of the rule as to his right to be present would fail; for he is voluntarily absent when he ought to be present, and cannot complain of the consequence of his own voluntary act. His voluntary absence must be taken to be a waiver of his right to be present. But, upon another view of the circumstances of this case, he cannot be heard to take any advantage of his absence when the verdict was rendered. He was present in court when the trial was commenced, and when the case was put to the jury; and though under recognizance of bail before that time, for his appearance to answer the charge brought against him, he was no longer at liberty, but was in custody of the law. If he afterwards withdrew from the court, or escaped, so as not to be present at the return of the verdict, it is by his own unlawful act, of which he should not be permitted to take advantage. His absence must be considered, at least, as a waiver of his right to be present; and his own legal act should not be permitted to thwart the process of the law to his advantage.

Hence, though the verdict in his absence was irregular, so far as his being present, and in the power of the court, to submit to its judgment, yet no prejudice was done to his rights, and he can take no benefit from his own illegal act.

We, therefore, think that this ground of error was properly overruled.

The next error relied on as ground of reversal is, that at the term previous to that at which this verdict was found, the court discharged the jury when there was no necessity, and without the consent of the accused.

This objection was taken in the court below, upon motion in arrest of judgment; and, in support of it, it was shown by the record that the court held over another day after the jury was discharged, at the previous term, and that the jury were discharged because they were unable to agree.

The question of the power of the court to discharge a jury in criminal cases, without the consent of the defendant, is one in which great contrariety of opinion exists in the courts of this

confederacy, and of the several states; the rule, on the one hand, being held, that the discharge of the jury, without the defendant's consent, or unless for reasons of plain and absolute necessity, amounts to an acquittal, because of the constitutional protection to the defendant against being put twice in jeopardy of life or liberty; and, on the other hand, the rule held being that the power to discharge is a matter within the sound discretion of the court, to be exercised whenever the ends of public justice require it; and that the exercise of the power in any given case is not a bar to a subsequent trial and conviction. The former rule is held by the courts of Pennsylvania, Virginia, North Carolina, and Tennessee, and the latter rule is held in the Supreme Court of the United States, and in Massachusetts, New York, Kentucky, Illinois, and in this state, and also by the United States Circuit Courts.[1] Wharton's Amer. Cr. Law, 206, *et seq.*, and cases there cited.

[1] The cases on this point may be divided into two general classes: 1st. Where any discharge of the jury, except in cases of violent necessity, is held a bar to all subsequent proceedings. 2d. Where it is held that the discharge of the jury is a matter within the sound discretion of the court; and that when, in the exercise of a sound discretion, it takes place, it presents no impediment to a second trial. The first view has been taken by the courts of Pennsylvania, Virginia, North Carolina, Tennessee, and, to a certain extent, of Alabama. The cases in Pennsylvania where this position is maintained are Com. v. Cook, 6 Serg. & Rawle, 577; Com. v. Clue, 3 Rawle, 498; Peiffer v. Com., 3 Harris, 468; but see McCreary v. Com., 24 Penn. St. R., 323; Com. v. McFadden, 11 Harris, 12. In Virginia, mere inability in the jury to agree is not such a necessity as will justify the court in discharging them. Williams v. Com., 2 Grattan, 568. The same opinion is held in North Carolina. State v. Carrigues, 1 Hay., 241; Spear's case, 1 Deveresux, 491. On this point, the courts of South Carolina, Indiana, and Alabama have ruled differently. Powell v. State, 19 Ala., 577; Wright v. State, 5 Ind., 290; State v. McLemore, 2 Hill S. C., 680. In the case of State v. Waterhouse, 3 Yerg., 278, the supreme court of Tennessee, Peck, J., dissenting, held that it was discretionary in the court, even in capital cases, to discharge the jury; but in Mahala v. State, the court unanimously held that the inability of the jury to agree upon a verdict did not justify a discharge by the court. It was out of the power of the court, it was said, to discharge them without consent, *except in case of sickness, insanity, or exhaustion among themselves.*

In Alabama, the following may be said to be fully established: That courts have not, in capital cases, a discretionary power to discharge a jury, after evidence given. 2d. That a jury is *ipso facto*, by the determination of the authority of the court to which it is attached. 3d. That the court does possess the power to discharge, in any case of pressing necessity, and should exercise it whenever such case is made to appear. 4th. That sudden illness of the prisoner or a juror, so that a trial cannot proceed, are ascertained cases of necessity, and that many others exist, which can only be defined when particular cases arise. 5th. That a court does not possess the power, in a capital case, to discharge a jury because it cannot or will not agree. 6th. That such discharge operates as an acquittal. Ned v. State, 7 Porter, 188; State v. Abram, 4 Ala., 272.

2. The Supreme Court of the United States and the appellate courts of Massachusetts, New York, Maryland, Ohio, Indiana, Missouri, Illinois, Kentucky, and Mississippi, have held that the discharge of a jury by the court, in the exercise of a sound

We consider the latter rule as founded in the better reason, and more just and convenient in its operation. As to the expediency of such power lodged in and exercised by the court, the views of the Supreme Court of the United States appear to be sound and convincing. "We think," say that court, "that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with great caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases, especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests in this, as in other cases, upon the responsibility of the judges under their oaths of office." United States v. Perez, 9 Wheat. 579.

As to the objection that the party is protected by the constitution from being twice put in jeopardy, it appears to be clear that the sense of the constitution is, that no man shall be a second time put upon trial for the same offense after having been once tried, and either convicted or acquitted of the same offense. People v. Goodwin, 18 John. R., 187; U. S. v. Haskell, 4 Wash. C. C., 409. And there is great force and truth in the language of Mr. Justice Washington in the case last cited, in which he meets the objection founded on the constitu-

discretion, is no bar to a second trial. In the Supreme Court the following cases are relied on: United States v. Haskell, 4 Wash. C. C., 409; U. S. v. Gilbert, 2 Sumner, 19; U. S. v. Coolidge, 2 Gall., 364; U. S. v. Shoemaker, 2 McLean, 114; U. S. v. Perez, 1 Wheaton, 579. The decisions in those states maintaining this position are, Com. v. Bowden, 9 Mass., 194; Com. v. Purchase, 2 Pick., 521; People v. Goodwin, 18 John., 187; People v. Olcott, 2 Johns., 301; Sheppard v. People, 11 E. P. Smith, 407; Hoffman v. State, 20 Md., 425; Moore v. State, 1 Walk., 34; Josephine v. State, 39 Miss., 613; State v. Stone, 2 Scam., 326; Dobbins v. State, 14 Ohio St., 493; State v. Nelson, 26 Ind., 366; State v. Walker, ib., 346; Com. v. Olds, 5 Little, 140; Const. Mo., art. 11, § 10; 3 Story on Const., 660; 1 Tuck. Black., App., 305.

tional privilege in question. "The moment," says he, "it is admitted that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the constitution to a discharge of the jury, before conviction and judgment, is abandoned; because the exception of necessity is not to be found in any part of the constitution, and I should consider this court as stepping beyond its duty in interpolating it into that instrument, if the article of the constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction."

In this case the reasons and circumstances upon which the court acted, in discharging the prior jury, do not appear; and as the court had the power to do the act, we must presume that it rightly exercised it. This ground of error, therefore, cannot be maintained.

The last error relied on is the rule of law stated by the court to the jury in relation to the question of malice.

It appears that no exception was taken or reserved, at the time, to this instruction; nor does it appear that the instruction was, except by the recital in the motion for a new trial. It is not even set forth or stated by the court in the bill of exceptions taken to the overruling of the motion for a new trial. It is, therefore, clear that it cannot be regarded as a part of the record. It is embraced by the rule held in Haynie v. The State, 32 Miss., 400, and is much more clearly not a part of the record than the instructions in that case.

We think there is no error in the record, and the judgment must be affirmed.

WATSON *v.* STATE, 36 Miss. R., 593.

LARCENY OF SLAVES.

Where a bill of sale has been procured by false and fraudulent misrepresentation, without any consideration, from a weak-minded old woman, who was under the care and protection of the defendant, it is competent evidence to establish the defendant's original intention. Wharton's Am. Cr. L., 1855; Bishop Cr. Law, 421; 2 East P. C, 665, 693.

A person leaving this state with the felonious intention of stealing slaves in another state, and bringing them into this state, and here converting them to his own use, and carries that design into execution, is guilty of larceny, and may be indicted in this state for such.

The legal possession of goods stolen continues in the true owner; and every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation, which may be the subject of indictment in every state to which the goods are removed.

Error to Clarke circuit court.

HANCOCK, J.:

The plaintiff in error and one N. Shotts were jointly indicted in the court below for the larceny of six slaves, which, in one count of the indictment, were alleged to be the property of Mrs. Elizabeth Peterson; and in the second, the property of the children (naming them) of Mrs. Peterson; and in the third count they were alleged to be the property of Mrs. Peterson and her children. The indictment charged, in the usual form, that the larceny was committed in Clarke county, in this state. Shotts and the plaintiff in error severed in the trial, and the plaintiff in error pleaded not guilty to the indictment.

It appears from the bill of exceptions that in the latter part of the year 1854 the defendant Watson and his co-defendant Shotts, and one Simon Box, went to a lawyer (Smith) in Clarke county, in this state, for the purpose of procuring his services in obtaining letters of guardianship for the minor children of Mrs. Peterson. It was then stated by Watson that he had removed Mrs. Peterson and her children to his house, in that county, and that they owned some negro property in Alabama, and that at his instance, Shotts had consented to become their guardian here, in order to procure a removal of the slaves from Alabama to this state. Letters of guardianship were obtained for Shotts from the probate court of Clarke county, and soon afterwards the witness procured a power-of-attorney from Shotts, authorizing one Morse to recover the negroes in Alabama, which, with the record of Shotts' appointment, was sent to said Morse. That about January 1st, 1856, this witness was advised, by a letter from Morse, that he had obtained possession of the negroes; and Shotts then gave Watson a power-of-attorney to go after the negroes, and to receipt to Morse for them; and shortly after this,

Watson returned to Clarke county, and informed the witness that he (Watson) had the negroes. That after the power-of-attorney was drawn up, and before Watson went to Alabama, he informed witness that he would not let Shotts have the negroes, as they were his. That afterwards, when the probate court was proceeding against Shotts for a failure to return his inventory, Watson told Shotts, in the presence of this witness, that he would not let him have the negroes; that he had given him (Shotts) his note for $200 for the power-of-attorney, and that he did not intend to pay that note.

It further appeared that, in the spring of 1856, Watson exhibited his letters of attorney to another witness (George Evans), and then declared that he intended to appropriate the negroes to his own use. Witness communicated this to Shotts and to one of Shotts' securities.

Shotts' final settlement as guardian, made January 6th, 1857, was introduced. In this he charges himself with the Peterson negroes. A receipt of Watson, as guardian for the Peterson children, acknowledging the receipt of these slaves from Shotts, the former guardian, was also introduced in evidence. This receipt was dated November 29th, 1856.

It further appeared that Watson brought the slaves to Clarke county; that he removed them from place to place clandestinely; that he offered to sell them in Alabama and this state; that on one occasion when he offered them for sale, he stated that his title was not good, and the purchaser would have to risk it; but that he would sell them so low that a speculation could be made out of them.

It further appeared that after Watson's appointment as guardian, he was committed to jail by the court of probates for a contempt, in not obeying its orders in reference to said slaves; that while he was thus imprisoned, he sent for one of the witnesses, and asked him to use his influence to procure his release; and promised that if witness would procure his release, he would return five of the slaves. He stated to this witness that he had sold all the negroes, and that nobody but himself could get them back.

The surety of Shotts, on his guardian's bond, to whom wit-

ness, Evans, had communicated what Watson had stated in reference to appropriating the slaves to his own use, immediately went to Shotts and informed him of it, and requested him to go to Alabama and revoke the power-of-attorney, and prevent a delivery of the negroes to Watson. Shotts denied to this witness that he had given the power-of-attorney. Witness then carried Shotts to the lawyer who drew it up, and Shotts then confessed it, and promised to prevent Watson from getting the negroes.

It was further proved in evidence that, in 1856, when the probate court was proceeding against Shotts for a failure to return his inventory as guardian, and when Shotts was endeavoring to get a continuance for one term, that Watson was present, and stated that he had given $200 for the power-of-attorney from Shotts, authorizing him to get the negroes from Morse; and if the continuance was granted, that before the next term of the court, he would have the negroes run to Texas.

Witness Williams, who was appointed guardian of the Peterson children, after the removal of Watson from office, stated that he had received only one of the negroes.

The defendant read in evidence the appointment of Shotts as guardian, the final settlement of Shotts, and his own appointment, and an order of the court of probates directing Shotts to deliver over the estate of his wards to defendant; also an order of the said court, ordering his bond to be put in suit, and an order directing the defendant to be confined in jail for a contempt, in refusing to account with and deliver over to the order of said court said slaves. The defendant read in evidence a deed of gift from James Fare, the father of Mrs. Peterson, by which the slaves in controversy were given to her and her children. This deed was dated in 1843. He then read in evidence a power-of-attorney from Mrs. Peterson, dated November 7th, 1854, and authorizing him to take possession of the said slaves, and to sell and dispose of them as he saw proper. He then read in evidence a bill of sale of the slaves, made by Mrs. Peterson, on March 16th, 1855, by which the said slaves were conveyed to him for $7,000.

The defendant then introduced Mrs. Peterson, who identified the slaves mentioned in the indictment, except two, as the same

mentioned in the deed from her father to her, and as the same mentioned in her bill of sale to the defendant. She further stated that she executed said bill of sale, but stated that she did so without any consideration. She denied that she signed the power-of-attorney to defendant, before referred to.

On cross-examination, she stated that the said bill of sale was never intended by her to convey her title to the slaves, but that she was induced to sign the same through the false representations of the defendant, who induced witness to believe that one Simeon Box and one Nathaniel Shotts had some claim on the property, and that they intended to enforce it, and thus deprive her of her own slaves; and the only way to avoid their claim was to convey her property to him; and that, by their false representations, she was induced to make the bill of sale. She further stated that the defendant, Watson, had induced her to come to the state of Mississippi, by promising to furnish her with land, and that he would take care of her and her children, which he had never done.

To so much of the witness' testimony, on cross-examination, as tends to show fraud in the bill of sale, the defendant objected; but his objection was overruled, and he excepted.

Simeon Box, for defendant, stated that he had sold to defendant, for Mrs. Peterson, an interest in a mill, and that soon afterwards he met Mrs. Peterson, who requested him to rescind the trade, for the reason that she had sold all of her negroes to defendant.

Nathaniel Shotts (co-defendant) was sworn for the defendant, and stated that on the 7th of November, 1854, he was a justice of the peace in Clarke county, and that on that day Mrs. Peterson came before him with the power-of-attorney heretofore mentioned as given by her to Watson, and stated that she wished to execute the same, but was unable to write; whereupon witness signed her name to the instrument, and she made her mark. This occurred at defendant's house, where Mrs. Peterson was living at the time.

Cross-examined.—Witness states that he did not read the power-of-attorney to Mrs. Peterson, and did not know she had

read it. He stated to her a part of the contents; Watson also stated to her some of its contents.

The defendant proved, by a deputy sheriff of Clarke county, that the witness had an execution in his hands against Watson, and was endeavoring to levy it on the negroes in controversy, about the time he was removing the said slaves from place to place clandestinely.

The bill of exceptions recites that "evidence was then introduced by the State which went to show that Mrs. Peterson was of very weak and imbecile mind;" to which defendant objected; but his objection was overruled, and he excepted. Proof was introduced by the State showing the value of each of the slaves.

This was all the evidence.

The court gave the following instructions, at the instance of the State:

1. If the jury believe, from the evidence, that the defendant took and carried away the slaves named in the indictment, or any of them, with a felonious intent, he is guilty.

2. If the defendant took possession of the property under color of legal proceedings, yet if those proceedings were instituted at the instance of the defendant, and with an original felonious intent, then he is guilty of larceny, and the jury should find him guilty.

3. It is not necessary that Watson should have disposed of the slaves mentioned in the indictment; if he took them with a felonious intent, and had them in the county of Clarke, he is guilty, and the jury should so find.

4. If the jury find Watson guilty, they should separately find the value of each slave, which is shown by the evidence to have been feloniously taken.

5. If the jury believe, from the evidence, that Watson obtained possession of the slaves named in the bill of indictment, or either of them, in due and regular course of law, yet with an original felonious design, by him conceived and expressed, to deprive the true owner or owners of the use of them, and to convert the same to his own use, and that he did, in pursuance of such original felonious design (although aided by the process

of the law, deprive the true owner or owners of the slaves, or either of them, and convert them to his own use, then the law is with the state, and the jury should find the prisoner guilty.

6. That if the defendant conceived an original felonious design in this state and county, to deprive the true owner or owners of the use of the slaves, and to convert them to his own use, and obtained legal possession of them in the state of Alabama, and afterwards brought them to this state and county, and then, in pursuance of such original felonious design, conceived in this state, did deprive the owner or owners of the property of the use thereof, then that is a taking within this state within contemplation of law; and if the jury believe, from the evidence, that the defendant did so take the slaves, the law is with the state, and the jury should find the defendant guilty.

The following instructions were asked by the defendant. The 3d and 6th were given, and the others refused.

1. That if the jury believe, from the testimony, that Watson got possession of the said slaves in the state of Alabama, as the agent of Shotts, who was the guardian of the Peterson children, and that Watson then held the same as such agent until his subsequent appointment as guardian in the stead of Shotts, and then receipted to Shotts for said slaves, as guardian aforesaid; although they may believe he subsequently converted the negroes to his own use, his possession was one of trust, and not a felony, and the jury must acquit.

2. That if the jury believe, from the evidence, that Watson had, previous to the alleged felony, acquired the title and interest of Mrs. Peterson in the property mentioned in the indictment, although they may believe that such title was procured by fraudulent means, still he is a co-tenant in common with the Peterson children; his subsequent conversion of the whole of the property to his own use, although a wrong, is not a felony, and the jury must acquit.

3. That to make out the charge of larceny it is necessary to prove a taking and carrying away in the county in which the alleged felony is charged to have been committed, and that the state, to sustain this prosecution, must prove a taking and carrying away in Clarke county.

4. Though the jury may believe, from the evidence, that the defendant received a conveyance of the negroes mentioned in the indictment from Mrs. Peterson, with the intention of converting them to his own use, and afterwards, in furtherance of such design, procured from Shotts, the then guardian of Mrs. Peterson's children, a power-of-attorney to receive said negroes, and bring them into this county, and convert them to his own use; yet if they further believe from the evidence that said conveyance and power-of-attorney were freely executed by Mrs. Peterson and Shotts respectively, they cannot find the defendant guilty under this indictment.

5. That the fact that Mrs. Peterson is of weak mind is no evidence that she did not freely and voluntarily execute said conveyance.

6. If the jury believe, from the evidence, that there were no such negroes as Lucy and Oliver belonging to either or any of the parties mentioned in the indictment, then, so far as these negroes are concerned, the jury must acquit.

The jury returned a verdict of guilty, and the defendant moved for a new trial, which being refused, he tendered a bill of exceptions, and sued out this writ of error.

F. Anderson, for plaintiff in error.

1. If any crime was committed in this case, it was committed partly in Alabama and partly here; and is, therefore, not indictable in this state. If the crime has been committed in Alabama, and the goods above named removed here by the prisoner, he is not indictable here. Simpson v. State, 4 Humph., 458; People v. Gardner, 2 Johns. R., 477; People v. Schenck, ib., 479; State v. Brown, 1 Heywood R., 100; Story's Confl. L., §§ 619–624; Butler's case, 3 Institutes, 113; 2 East, 772; 38 Eng. Com. L., 23.

2. In cases of this kind there must be a conversion; and there was no conversion in Alabama, and therefore there was no larceny there, and there was no felonious taking in this state, and hence there was no larceny here. 2 Russ. on Cr., 53.

3. Under all the circumstances of the case, no larceny was committed; there must be something more than a felonious in-

tention at the time possession was obtained. See Rex v. Walsh, 1 Russ. & Ry. Cr. Cases, 215; 2 Russ. on Cr., 30, 31, 32; 2 East Pl. Cr., 693.

T. J. Wharton, attorney general.

1. The facts prove clearly a case of larceny; the original taking was obtained by fraud, and with the intent then feloniously to deprive the owner of them. 2 Russ. on Cr. (5th Am. ed.), 7–9; 1 Hale P. C., ch. 33, § 8; 8 Porter, 511; Wharton Am. C. L. (1st ed.), 410; 2 East P. C., 685.

2. The possession in the state, at every step, was a new caption and asportation if the goods were originally in Alabama, and such being the case, it was larceny under the laws of this state. See Bishop C. L., §§ 595–600, and §§ 650, 651; Barbour's C. L. (2d ed.), 167; 2 East P. C., 771, 772; 1 Hawkins' P. C., ch. 33, § 9; 5 Binney R., 619–627; People v. Burke, 11 Wend., 129; 1 Mass. R., 115; 2 ib., 14; 4 Humph., 456; Jones v. State, 30 Miss. R., 653; 3 Stew. Ala. R., 123; 14 Ala., 486; 18 ib., 727; 12 Missouri R., 453; 4 How. (U. S.) R., 410, 434; 7 Leigh., 752; 2 McMullen, 282; 1 Porter, 118.

HARRIS, J.:

The plaintiff in error was indicted, in the circuit court of Clarke county, for stealing certain slaves. The offense was alleged to have been committed in the county of Clarke. The plaintiff in error plead not guilty, and the cause was submitted to the jury on this issue. Several objections were made to the admissibility of testimony, by the counsel for plaintiff in error, in the progress of the trial, which were overruled by the court, and exceptions taken and made part of the record, which will be hereafter noticed. Also, the instructions given and refused; all which appear in the record. The jury returned a verdict of guilty. A motion was made for a new trial, which was refused, and the plaintiff in error sentenced to ten years imprisonment in the penitentiary.

From this judgment a writ of error is prosecuted here, and the following causes for reversal are assigned:

1st. The court erred in overruling the objection of the plain-

tiff in error to that portion of the testimony of Elizabeth Peterson drawn out on cross-examination, which went to show fraud in the bill of sale, executed by herself to plaintiff in error.

2d. The court erred in overruling the objection of plaintiff in error to the testimony introduced to show weakness and imbecility of mind of Elizabeth Peterson.

3d. The court erred in granting each and all of the instructions asked by the state, except the fourth.

4th. The court erred in each and all of the instructions asked by the defendant, numbering respectively, 1, 2, 4 and 5.

5th. The court erred in overruling the motion for a new trial.

The two first assignments of error relate to the testimony introduced by the state, for the purpose of showing the original, wrongful, fraudulent, and felonious intent of the defendant. That the bill of sale was procured by false and fraudulent representations, without any consideration, and under pretense of protecting the title and possession of her property, for her benefit, from a weak-minded old woman, under his care and protection, was certainly competent evidence to be submitted to the jury, to establish the defendant's original intent. Wharton's American Cr. L., § 1855; Bishop's Cr. L., § 431; 2 East P. C., 685 and 693.

The third assignment of errors embraces the instructions given by the court at the request of counsel for the state; and the fourth assignment embraces those asked by the defendant's counsel and refused.

We think the instructions, as given to the jury, taken together, present no ground of error for which the judgment should be reversed.

It is insisted that the sixth instruction for the state was erroneous. That instruction substantially asserts the position, that one leaving this state, with the felonious design of stealing slaves in Alabama, and bringing them into this state, and here converting them to his own use, and who carries that design into execution, both in Alabama and Mississippi, is guilty, as charged in the bill of indictment, of stealing here. It is said that, while it is true by the common law, that "if one steal

goods in one county and carry them into another county, he may be indicted in either county for the theft; but if one steals goods in one state, and carry them into another state, he is not liable in the latter state for larceny." And for this distinction we are referred to Butler's case, cited by Lord Coke, 13th part of his reports, page 52, Vol. VI, and to 3 Institutes, 113, and other text writers and cases, both English and American, founded on and citing Butler's case.

Butler's case was this. Butler and other pirates robbed some of her majesty's subjects, in the twenty-eighth year of the reign of Queen Elizabeth, off the coast of Suffolk, upon the high sea, and brought the goods into Norfolk, where they were apprehended, with the goods, and brought before Lord Coke, who was then a justice of the peace of that county. He says: "They confessed a cruel and barbarous piracy, and that the goods they then had with them were part of the goods they had robbed from the queen's subjects on the high sea. I was of opinion (says he) that in that case it could not be felony, punishable by the common law, because the original act—the taking of them—was not an offense whereof the common law taketh knowledge; and by consequence, the bringing them into a county, could not make the same felony punishable by our law; and it is not like where one stealeth goods in one county and brings them into another. There he may be indicted of felony in any of the counties; because that the original act was felony, whereof the common law taketh knowledge. And yet, notwithstanding, I committed them to the jail, until the coming of the justices of assizes; and at the next assizes, the opinion of Wray, C. J., and Periam, J., was, that forasmuch as the common law doth not take notice of the original offense, the bringing of the goods stolen upon the sea into a county did not make the same punishable at the common law." He adds: "And this in effect agrees with Lacey's case, cited in 2 Coke's R., 93, in Bingham's case."

This report of Butler's case was made by Lord Coke when he was chief justice, on a question of admiralty jurisdiction, arising in Hawkins' case, 13 Coke, 52, from which the above report is taken. The point there presented was, "If a man

committed piracy on the sea, and another, knowing thereof, receiveth and comforteth the defendant, within the body of the county, whether, under the Stat. 28, H. 8, ch. 16, he is indictable as a receiver and abettor, inasmuch as the offense of the accessory hath its beginning in the body of the county?"

"And it was resolved by them, that such receiver and abettor, by the common law, could not be indicted and convicted; because the common law cannot take cognizance of the original offense, because that is done out of the jurisdiction of the common law, and, by consequence, when the common law cannot punish the principal, the same shall not punish any one as accessory to such a principal; and, therefore, Coke, C. J., reported to them a case which was in Suffolk." Butler and others, as stated above.

Considered with reference to the question before the court, whether an accessory to an offense committed abroad, against another jurisdiction, and not cognizable by the common law of England, would be indicted and punished as such accessory, in England, or whether an offense committed against the laws of one jurisdiction, could be punished in another jurisdiction having different laws. Butler's case could only be in point to show, that piracy and robbery on the high sea could be punished in a county in England where it never happened.

The question here presented was never discussed, considered, or thought of, so far as we can learn from any report of Butler's case extant. And to show conclusively that this was the opinion of Lord Coke, and its extent, after stating that Butler and his confederates were committed to Sir Robert Southwell, vice-admiral of said counties, he adds: "And this, in effect, agrees with Lacey's case, which see in my reports, cited in Bingham's case, in 2 Reports, 93," &c. Upon referring to that case, it appears as follows: Lacey struck Peacock, and gave him a mortal wound, upon the sea, of which Peacock died, at Scarborough, in the county of York; and Lacey was discharged of it; for those of the county of York could not inquire of his death without inquiry of the stroke; and of the blow they could not inquire, because it was not given within any county. It is obvious, therefore, both from the purpose from which Lord Coke

cited Butler's case, as well as the direct statement that it agrees with Lacey's case, that the point here presented was never considered in Butler's case.

And that such is Lord Hale's understanding of Butler's case, see 2 Hale P. C., 18 and 163.

And in 3 Inst., 113, Lord Coke, in treating of the subject of "Piracy, &c., committed on the high seas," cites Butler's case to show that such offenses, committed out of the jurisdiction of any county in England, could not be there punished by the courts of the common law.

It will be perceived, therefore, that Butler's case was not designed to create an *exception*, but falls within a rule as old as the common law itself—that an offense, to be indictable, must have been completely committed in the county, and must be so charged in the indictment, and proved to the satisfaction of the jury.

But again: it is a principle universally admitted, and so Lord Coke states the rule in the Butler case, as cited, "that where one stealeth goods in one county, and bringeth them into another, then he may be indicted for felony in any of the counties." "Because," says Lord Coke, "that the original act was felony, whereof the common law taketh knowledge."

While the principle thus stated has been universally sanctioned, the *reason* assigned by Lord Coke is almost as universally omitted, and one given, not only much more satisfactory as to the foundation of this rule, but destructive of the exception sought to be engrafted on it by the construction placed upon Butler's case.

There never was a time in the history of the common law when it did take knowledge in one county of an "original act" of felony in another county, any more than it now takes notice of any crime in one state or county, committed in another. So jealous were our ancestors of the preservation of this principle, that the *venue* was always regarded as matter of substance; and, therefore, at common law, when the offense was commenced in one county, and consummated in another, the *venue* could not be laid in either, because no offense was committed in either.

1 Archb. Cr. P., 64, note; 1 Hale P. C., 651–53; Hawkins P. C., bk. 2, ch. 25, § 36.

That the reason assigned by Lord Coke above, for the principle stated, is not the true reason, or, indeed, any reason at all, will be abundantly manifest from an examination of the text-writers, both English and American, as well as adjudged cases cited by them.

Mr. Archbold, after stating this rule of the common law, and that it was always regarded as matter of substance, citing many examples from the books to show its strictness and explain its reasons, says: "At common law, however, if a party steals goods in the county of A., and carry them into the county of B., he may be indicted or appealed of larceny in the latter county. But this does not contradict the general rule, but is founded upon another principle, viz., that the possession of goods stolen, by the thief, is a larceny in every county into which he carries the goods, *because the legal possession still remaining with the owner, every* moment's continuance of the trespass and felony amounts, in legal contemplation, to a new caption and asportation." 1 Arch. Cr. P., 63–4, note 1, and 69, note 2; 2 East P. C., 771–2.

So Mr. Russell says: "Larceny, like every other offense, must regularly be tried in the same county or jurisdiction in which it was committed; but it should be noted, with respect to larceny, that the offense is considered as committed in every county *or jurisdiction* into which the thief carries the goods; for the legal possession of them remains in the true owner, and every moment's continuance of the trespass and felony amounts to a new caption and asportation." 2 Russell Cr. Law, 116.

So, also, Lord Hale lays down the reason of the rule: "If A. robs B. in the county of C., and carries the goods into the county of D., A. cannot be indicted of *robbery* in the county of D., because the *robbery* was in another county; but he may be indicted of larceny or theft in the county of D., *because it is theft, wherever he carries the goods.*" 1 Hale P. C., 507–8; 2 ib., 163.

The same principle, *for the same reason*, is stated in 2 Dyer R., 89.

And Lord Coke himself, in Bulwer's case, 7 Coke, 57, admits

the same principle. "For," says he, "felony doth not divest property."

Again: Mr. Hawkins says, "It is certain that he who steals my goods in the county of B., and carries them into the county of C., may be indicted or appealed in the county of C., as well as that of the county of B., *because the possession still continuing in me, every moment's continuance of the trespass is as much a wrong, and may come under the word* CEPIT, *as much as the first taking.*" Hawkins P. C., ch. 19, § 52, p. 151.

Mr. East states the same principle, and gives the same reason, in nearly the same language. 2 East's P. C., 771-2.

It is, then, for the reason so often repeated in the cases just cited, and not because of the supposed "knowledge" which the common law takes of offenses committed in different counties or jurisdictions, that the removal of stolen property from one county to another is universally admitted by the authorities to be a larceny in every county into or through which it is removed.

We again repeat, that never in the history of the common law did it take "connusance" *in one county* of offenses committed *in another*, any more than it took notice *in England* of offenses committed *in the United States*. The common law, in every age and every country where it has been recognized, has confined itself, in the punishment of crimes and misdemeanors, to the county where they have respectively happened. It has, therefore, recognized no such distinction, in its operation, between *counties* and *countries* as that supposed to be established by Butler's case. The *reason* assigned for the distinction, therefore, between counties and states, is wholly unsupported in fact or upon principle; and the *distinction*, thus originated, has only received the dubious sanction of three illy-considered cases in England. Rex v. Prowes, 2 Eng. Crown Cases, 348, decided in 1832, upon the authority of Butler's case; and Regina v. Madge, 38 Eng. C. L. R., 23, on the sole authority of Rex v. Prowes, decided in 1839; and Rex v. Anderson, decided in 1763, cited in 2 East, 772. And a few early cases in this country, following and citing the reasoning and authorities already referred to.

In support of this distinction we have been referred to several American authorities, and to text-writers, noting the exception supposed to be made by Lord Coke, in Butler's case, and giving that case and the reason it assigned for such exception.

The State v. Brown, 1 Hayward, N. C. R., 116, decided on the ground that there was but *one* offense, and not a new caption and asportation at every step, as held by the authorities already cited, and on the authority of Hawkins' P. C., citing Butler's case, so holds.

It is so held in Simpson v. State, 4 Humph., 456, and an elaborate argument made, to prove that when property is stolen in one state, and removed to another, the legal possession of the true owner is thereby lost, and the wrong-doer acquires a right thereto which gives him *criminal*, though not civil, immunity for the continued trespass and wrong.

The two cases from 2 John. (The People v. Lardiner, 477, and The People v. Schenck, 479), deciding the same way, and cited in 4 Humphries, neither furnish us *a single reason or authority* for their decision. On the contrary, in the first case two authorities are cited to the contrary. These two cases are subsequently directly overruled in 11 Wendell, independent of the statute, under which this last case occurred.

The only remaining case in this country where this exception is maintained, which has come to our notice, is the case of Simmons v. The Commonwealth, 5 Binney, 617.

This case is reviewed by Mr. Bishop, in his work on criminal law, vol. 2, § 596. After having stated in the previous section that: "Our courts cannot punish offenses against a foreign government, nor, therefore, take cognizance of such offenses. Neither, on the other hand, can a man be heard to excuse himself for a criminal act *here*, by alleging that he did the same thing *elsewhere*." He says: "Therefore, when a jury, sitting in Pennsylvania, found a special verdict, 'that the defendant did feloniously steal, take, and carry away the goods * * * within the state of Delaware, and that he brought the same into the city of Philadelphia, within the jurisdiction of this court,' the judges very properly refused to sentence the prisoner; while probably the jury, on the facts, might have rightly con-

victed him of larceny in Pennsylvania. Always, when a man has within him property in this state, we may look into the legal relation he sustains to it. If he has stolen it in another state, he has not the right to its custody even here; and the rule in larceny is, that when a man, having in his mind the intention to steal, makes any removal or carrying away of personal property, to the custody of which he has no right, he commits the crime.

"And, therefore, in the above case, the finding of the jury, in so far as it stated a larceny in Delaware, was wholly irrelevant; and in omitting to say whether there was a removal of the goods by trespass, with the intent to steal them, in Pennsylvania, it was defective."

See, also, the reasoning of Justice Breckinridge, in his dissenting opinion.

On the other hand, the cases and text-writers in this country, and more especially those of latest date, with the exception of those referred to above, repudiate this exception, and maintain the original rule, to be found everywhere in the law books, "that larceny is considered as committed in every county or *state jurisdiction* into which the the thief carries the goods, *for the reason* that the legal possession of them remains with the true owner, and every moment's continuance of the trespass and felony amounts to a new caption and asportation." 2 Russell Cr. L., 116; The People v. Burke, 11 Wend., 129; State v. Bartlett, 11 Vermont R., 650; Hamilton v. State, 11 Ohio, 435; Hemmaker v. State, 11 Missouri R., 453; The Commonwealth v. Cummins, 1 Mass R., 116; Same v. Andrews, 2 Mass. R., 14; Same v. Rand, 7 Metcalf, 477; Same v. Uprichard, 3 Gray's R., 434; Cummins v. State, 1 Harris. & Johns. R., 340; State v. Ellis, 3 Conn., 185; State v. Douglass, 17 Maine, 195; State v. Somerville, 21 Maine, 14; State v. Kinman, 7 Richardson S. C. R., 497. See, also, 1 Bishop's Cr. Law, §§ 595–600; 1 Archb. Cr. Pl., 68, note 2 (by Waterman, 6th edit.), and 63, 64, note 1; 2 Archb. Cr. P., 355, 13, 14, 15, note 1; Wharton's American Crim. Law, §§ 1815–17 (4th revised edition); 2 Russell on Crimes, (7th Amer. edit.), 116 and notes, 118 and 119 and notes.

It is said: "There can be *here* no new caption or asportation at every step, unless the original taking were a felony, under the laws of this State, and *indictable here*."

Why should this be so? That a thief has stolen property in the county of Hinds is no more an offense punishable in Clarke than it would be in Alabama. Exemption from prosecution for such an offense is just as perfect in Clarke as it would be in Alabama or in England. It might, therefore, be said, with quite as much legal accuracy, that there can be no new caption or asportation in the county of Clarke, unless the original taking in Hinds were a felony under the laws of this state, *indictable in Clarke*. There is just as much reason for one position as the other.

The true question in every case is, not from whence came the wrong-doer, but has he committed larceny *in the county* where indicted? To ascertain this, we must look to the proof, in view of the definition of the offense.

The proof involves the intent and the act. The existence of the intent may be shown in any locality, county, state, or country. The commission of the act *must* be shown *in the county* where the indictment was had.

There is a wide difference between the proof of the *act* and the evidence of the *intent* with which it was done. The *intent* precedes the act, and may be evidenced at different times, and in various jurisdictions. It may be shown by the declarations of the actor, or by facts and circumstances happening in a distant country, or a different jurisdiction from that where the actual offense occurred. But the *act* which results from such unlawful intent, and is characterized by it, must be proved to have been committed in the particular county alleged in the indictment. See 1 Bish. Cr. Law, §§ 554, 556, 560, and many cases cited.

To give the court jurisdiction, whether by the common law or by our constitution, there must be a complete offense proved *in the county*, to the satisfaction of the jury, and not an offense in any other county or state.

To ascertain the ownership of the property, and the *bona fides* of the defendant's possession, in the county where the

offense is charged, it is competent to show the relation of the defendant to the property elsewhere, or that he came into possession of it in another county, or in another state or county, or even where no municipal law existed, by a wrongful and immoral act, contrary to the laws of nature; and that, in the prosecution of his original fraudulent design, he brought the property into the county where the indictment is found, and was *there* guilty of the illegal and felonious caption and asportation alleged against him.

While, therefore, the acts, the conduct, and situation of the accused in relation to the property, preceding the caption and asportation *in the county*, are evidence to his original and continued fraudulent intent, yet a man can neither be punished or escape punishment for larceny in one county, by reason of his having committed the like offense in relation to the same subject in another state or county. 1 Bishop, §§ 554 to 600.

And such is the principle clearly deducible from the case of Coon v. State, 13 S. & M., 246.

If it be true, as it is admitted from Butler's case to this day, everywhere, that the wrongful and fraudulent possession of goods, with intent to steal, neither by the law of nature, nor by the law of any civilized country, ever gave the wrong-doer a right to their possession; that the legal possession of such goods still remains with the true owner; and that every moment's continuance of such wrongful deprivation, with the intent to convert them to the taker's use, is a new taking; with what possible consistency, in reason, can a distinction be made on account of the locality from which the offender comes with his wrongful acquisition?

No matter whether he comes from another county or another state, or emerges from a state of nature for the first time, clothed with the moral guilt of larceny, our *common law* does not stop to inquire who he is, or from what clime he may have escaped, or of what offense he may have been guilty elsewhere; but finding him in the very act of taking, in this state, and carrying away the personal goods of another, with a felonious intent, against the laws of this state, it takes jurisdiction of the offense and the offender; otherwise our state not only affords refuge for

crime, but adds immunity for the past, license for the future, and right to the present possession, so far as relates to the principle, property so brought into our jurisdiction.

Larceny is defined to be "the wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his own use, and make them his own property, without the consent of the owner."

The original taking must be a trespass. Amer. Cr. L., 1864. A trespass is any transgression or offense against the laws of nature or society, whether it relates to person or property. 3 Black. Com., 208.

In the absence of all civilized government, it is agreed by all writers, that occupancy gives right, and this is regarded as the origin of property. Mr. Christian, in a note to the second volume of Blackstone's Commentaries, p. 8, familiarly illustrates the origin of property and the right to its enjoyment. He says: "When an untutored Indian has set before him the fruit which he has plucked from the tree that protects him from the heat of the sun, and the shell of water raised from the water at his feet, if he is driven by any daring from this repast, so easy to be replaced, he instantly resents the violation of that law of property which Nature herself has written upon the hearts of all mankind."

The right of property, therefore, exists by the law of nature, independent of municipal law, and had its origin in the same immutable principles of reason and justice, under the law of nature, which is the great object of municipal laws to preserve and enforce. That there was no government, no law, either common or statute, to punish the trespasser, who has possessed himself of the goods of the natural owner, does not sanctify his trespass, or ripen it into a virtuous or moral act, or give him title to the thing taken. The moment, therefore, that he takes his unlawful acquisition into the jurisdiction of the common law, with the intent to convert it to his own use, he has brought himself in the new jurisdiction, within the strictest definition of larceny. Such intentional violation of the possession and right of the true owner has every element in the definition, and every

essential of the moral guilt; and there can be no good reason why it should not incur the penalty of larceny. That Alabama is a sovereign state, having laws of her own against which the larceny in that state may be an offense, does not render the felonies in Mississippi the less an offense against our code. There is nothing in the nature or character of the respective offenses against the laws of the two jurisdictions calling for sympathy or lenity, or making the execution of the one dependent on the action of the other. This merciful doctrine of exemption from penalty, because of the continued and wilful repetition of the same offense, or of immunity for offenders, because of the number, enormity, and ubiquity of their offenses, is one which can find no sanction in the true benignity of criminal jurisprudence.

Regarding the question as an open one in this state, we feel no hesitation in declaring the rule, *without exception*, as to the doctrine of the common law, "that the legal possession of goods stolen continues in the true owner; and every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation," which may be the subject of indictment in every state to which the goods are removed, at common law.

That an eminent jurist may have decided differently, and that others have cited his error, who, in turn, have become the root of a new succession, adds nothing in our judgment to the force of *their reasoning*, which alone gives force to judicial opinions or precedents.

Counsel for plaintiff in error have mistaken the record in supposing that the third instruction, asked for the plaintiff in error, in the court below, was refused.

The third instruction was, "that to make out the charge of larceny, it is necessary to prove a taking and carrying away in the county in which the alleged felony is charged to have been committed; and that the state, to sustain this prosecution, must prove a taking and carrying away of the negroes in Clarke county." This instruction was given, and not refused, as supposed.

The case before us does not, therefore, involve the question before the court in the case of Norris v. State, 33 Miss. R., 373,

where this instruction was refused under a similar indictment.

The question, in this case, was one of fact, submitted to a jury, with proper instructions from the court. They found the defendant guilty, as charged in the bill of indictment, and with their verdict we see no good reason to find fault.

The motion for a new trial was properly refused.

Let the judgment be affirmed.

MIAZZA *v.* STATE, 36 Miss. R., 613.

ILLICIT RETAIL OF INTOXICATING DRINKS.

Judicial districts may be so changed by law as practically to transfer the judge to another district.

The time charged in an indictment for unlawful retailing, is not essential to or descriptive of the offense, and is therefore immaterial except under plea of limitation.

In misdemeanors, a plea in abatement being found against the defendant, the judgment should be final, and not *respondeat ouster*.

Other indictments of like import pending against same party, will not be allowed to sustain a motion in arrest of judgment. He must plead to those indictments, and may set up his former conviction or acquittal.

Error to Hinds circuit court. WATTS, J.

The plaintiff in error, at the March term, A. D. 1856, of the court below, was indicted for retailing without license. The indictment charged, that the defendant, "on the 10th day of December, A. D. 1855, with force, &c., at the county aforesaid, to wit, in the city of Jackson, in the county aforesaid, did sell vinous and spirituous liquors, in less quantity than one gallon, without then and there having a license," &c.

The defendant first moved to quash the indictment, and his motion was overruled. He then pleaded in abatement, denying the right of the Hon. John Watts, judge, then presiding in the court, to hold said court, upon the ground that the county of Hinds was, at the date of the election of said Watts, a part of the third judicial district of the state, in which, at the date of said election of Watts, the Hon. J. S. Yerger was elected judge;

and that the said Yerger was not dead, and had not resigned, and had not interchanged with Watts.

The district attorney replied to the plea, by averring that the Hon. John Watts, who presides in this court, is the judge of said court, duly qualified and authorized, under and by virtue of the constitution and laws of the state, to preside over and hold the said court; and that the Hon. J. S. Yerger is not judge of the said court.

To this replication the defendant demurred, and his demurrer was overruled.

The cause was then submitted to the jury, on the issue on this plea and this replication, and the verdict was for the state.

The defendant then pleaded not guilty, and the cause was again submitted to a jury, who found the defendant guilty as charged.

On the trial of the last issue, the state proved, by a witness, that the defendant sold vinous and spirituous liquors, in less quantities than one gallon, in January, 1856; and the defendant asked the court to instruct the jury, if the sale was not proven to have occurred on the day named in the indictment, they must acquit, which was refused.

After verdict on the plea of not guilty, the defendant moved for a new trial, and in arrest of judgment and in support of motion, read to the court two other indictments, for retailing, against the defendant.

These indictments were in the same words and figures as the one on which he had been tried, except that one of them charged the offense to have been committed on the —— day of February, A. D. 1856, and the other charged it on the 10th day of February, A. D. 1856.

Both of these motions were overruled, and final judgment pronounced, and the defendant sued out this writ of error.

T. J. Wharton, Esq., having been engaged before his election as counsel for the prisoner, the court appointed *J. A. P. Campbell, Esq.*, who appeared for the state.

T. J. Wharton and *Wm. M. Estelle*, for plaintiff in error,

Cited Arch. Cr. Pl., 84, 85, 90, 119; Wharton's Cr. L., 80,

81; Roscoe's Cr. Ev., 77, note 1; 3 Day's Cases, 283; Dick's case, 30 Miss. R., 631; Murphy's case, 24 ib., 584.

J. A. P. Campbell, for the state.

HARRIS, J.:

Plaintiff in error was indicted for selling spirituous liquors in less quantity than one gallon, without license therefor.

A plea in abatement was filed, denying that the presiding judge was judge of the Hinds Circuit Court, &c. To which there was replication, a demurrer to the replication, demurrer overruled, issue, and jury, and verdict for the state, and judgment that plaintiff in error answer over; who thereupon plead not guilty. Motion in arrest of judgment, and for a new trial. Motion overruled, and sentence and judgment pronounced. Writ of error was then sued out, and cause brought here.

The position taken by counsel for the plaintiff in error, on the trial of the plea in abatement, that it is not competent for the legislature to reorganize the judicial districts of the state so as to transfer a circuit judge out of the district in which he was elected, to another and a different district, is wholly untenable. The constitution itself makes provision for "interchange of circuits, in such manner as may be prescribed by law." It was no part, therefore, of the policy of its framers, as contended for, that the people of each district should be confined to the judge elected by them. The election of judges by the people had reference to other and more important objects.

We think there was no error in the instruction of the court on this point; nor was there any error in overruling the plaintiff's demurrer to the replication to his plea in abatement. It briefly but substantially presented the true issue.

It is next insisted that the court erred in refusing to charge the jury that, "if the testimony does not show that the offense named in the indictment was committed on the day named therein, the jury must find the defendant not guilty." This instruction was properly refused. Time is not material, except where it is the essence of the offense (or a necessary ingredient of it); it may be laid any day previous to the finding of the indictment, during the period within which the offense may be

prosecuted. Wharton's Am. Cr. L., § 261, and authorities cited; Miller v. State, 33 Miss. R., 360.

The motion in arrest of judgment, on the ground that other indictments of similar import were then pending in the same court against the same defendant, was properly overruled. There is no analogy between the principles held in the case of Murphy v. State, referred to, and the case at bar. The evidence in Murphy v. State was held insufficient, because it did not identify the offense. Here no such difficulty exists—the defendant knows whether he had license or not. Nor can the defendant be prejudiced by any number of indictments for similar other offenses. One conviction for each distinct offense can only be had, and may be plead in bar of any subsequent attempt to retry him for the same offense for which he has once been convicted or acquitted.

We see no error in their proceedings, except that judgment final should have been rendered against the plaintiff in error on the verdict of the jury against him, on his plea in abatement, instead of *respondeat ouster*, and of this *he* cannot complain.

Let the judgment be affirmed.

A re-argument was asked for, and refused.

LYNES *v.* STATE, 36 Miss. R., 617.

HOMICIDE.

A verdict of guilty will be set aside if it appear that illegal evidence was admitted, which *might* have operated to the prejudice of accused; but *aliter*, when it is manifest that the illegal evidence could not have influenced the verdict.

The statements of one or more conspirators are admissible against the others if made in the progress or in prosecution of the common design; provided, however, that the conspiracy be first established by proof *aliunde*.

The rules respecting confessions improperly obtained, considered.

Error to Jones circuit court. HANCOCK, J.

James Hightower, Thomas Morgan Lynes, Thomas Lynes, and Samuel Lynes, were indicted for the murder of one Charles

Landrum, the first as principal, the second for aiding and abetting the murder at the time, and the two last as accessories before the fact.

Morgan Lynes and Thomas Lynes were first put on their trial jointly at the October term, A. D. 1858, and were found guilty and sentenced to be hung. Their motion for a new trial having been overruled, they tendered a bill of exceptions, which contains all the evidence and the rulings of the court, and sued out this writ of error.

It appeared, from the evidence, that, at the September term, A. D. 1857, of the circuit court of Jones county, the three Lynes had been indicted for larceny, and that the deceased was the principal witness against them; that shortly after their arrest on this charge, both Thomas and Morgan Lynes had made threats against Landrum, and accused him of swearing a lie in his testimony before the grand jury who found the indictment; that, shortly after the killing, all the dogs of Landrum had died; that, three days before the killing, one of the dogs fell down in a fit, like that produced by strychnine, and died immediately after Morgan Lynes had left the premises of Landrum; that, about the same time, something had been thrown on Mrs. Landrum at night when she was in bed, and that the next morning she had sores on her hands and arms; that, on the night of the 14th of December, A. D. 1857, Morgan Lynes was at Landrum's house, and was engaged in playing at some game (the name of which does not appear) on a board; that, whilst they were playing, Landrum's nose commenced bleeding, and, at the suggestion of Morgan Lynes, he got up and went to the hearth, and Lynes went to the door of the house, and, as soon as he returned, Landrum was shot through a crack in the house, and died instantly. Immediately thereafter Morgan Lynes remarked to Mrs. Landrum, "You cannot accuse us of that; we have been too good to you." The house of Landrum was a small log cabin, with only one room, and the cracks were not ceiled or stopped in one end by the chimney.

A witness, who resided within half a mile of Landrum's, and about the same distance from Thomas Lynes', testified that, after the firing of the gun, she went to Landrum's, and from that

place to Thomas Lynes'; that, on her way to Thomas Lynes', she met Lemuel Lynes, and, about one hundred yards further on, she met Morgan Lynes, both of whom were going in the direction of deceased's house; that, opposite the place where she met Morgan Lynes, she heard and recognized the voice of Thomas Lynes, and Hightower, but she did not see them.

A piece of the patching which was shot from the gun was near the body of the deceased. A witness stated that, a short time before the killing, she had seen one of Thomas Lynes' sons wear pants striped like the patching; that the stripes were four copperas threads and *two* blue threads; but when the piece found near the deceased was produced, it was discovered that the stripes were of four copperas and *six* blue threads.

The next day after the killing an inquest was held, and Hightower and the plaintiffs in error were in custody as witnesses. They were examined and kept separate from each other. The plaintiffs in error, during the inquest, were told by several of the jury that their statements conflicted, and if they were guilty of the murder of Landrum, it would be better to tell the truth, and confess. Another person was sent by the jury to the prisoners, charged to make this statement, which he did. On the next morning after this, Thomas Lynes stated to a witness, who was not a juror, and who stated that he held out no inducements to the prisoner to confess, that "Hightower had loaded his gun at his (Lynes') house, about dark, and said he intended to kill Charles Landrum: that he left his house, and afterwards returned, and stated he had killed him; but that he had not hired Hightower to kill deceased." It was also proven that Morgan Lynes stated at the inquest that Hightower had confessed to him that he had killed Landrum.

The district attorney then proposed to prove the confessions of Hightower on these grounds: 1st. Because, being indicted as principal in the first degree, it was important in this trial to show his guilt; and—2d. A *prima facie* case of conspiracy having been made out, his confessions were evidence against his confederates. The court ruled against the objection of the defendants that the confessions were competent evidence; and thereupon it was proven by the same witness, that Hightower,

being informed of Lynes' confession, stated "that he killed Landrum, but that old man Lynes had put the rope around his neck; that old man Lynes had told him he had given all he had to his daughter, and if he would kill Landrum, he would give him his daughter and all he had; that this was about three weeks before the killing; and he went that night to an oak tree in front of Landrum's house, and intended to shoot him while at supper; but when he sat down, he (Landrum) took up his little daughter, and he was afraid he would kill her; that he stood about sixteen steps from the house, and shot him through a crack." The witness further stated that Hightower showed him where he (Hightower) stood, and he then saw the impression of some one's tracks, as though the person that made them had turned around on his heels from the house.

It was proven by a witness who resided with Landrum, that three days before the killing, an arrangement was made for him and one of Thomas Lynes' younger sons to go some distance to a mill, on the day the killing took place, and that it was contemplated that they would remain all night; and that, in pursuance of this arrangement, he was absent when Landrum was killed.

The state offered in evidence certified copies of two deeds, purporting to have been made by Thomas Lynes in September, A. D. 1857. By one of these all the land of the grantor, and by the other all his personalty, were given to his daughter Elizabeth. Objection was made to this evidence, because the deeds were neither proven nor acknowledged; but the objection was overruled. The state, in addition, proved by two witnesses that Thomas Lynes had acknowledged to them that he had given all his property to his daughter.

The defendants offered no evidence, except one witness, who proved for them that a material witness for the state had made threats against Landrum before the killing. The state, in rebuttal, proved by this witness and one other, that he and Landrum had made friends a short time before the killing.

The defendants excepted to the introduction in evidence of the confessions of Thomas Lynes and James Hightower, and to

the reading of the copies of the deeds; and after the admission of the evidence, they also moved to exclude it from the jury.

Several instructions were given, both on behalf of the state and the prisoners. The following instructions asked for by the prisoners were refused:

1. That if the confessions of Hightower and Thomas Lynes were procured by any promise or threat, they are entitled to no weight whatever.

2. That the statement to the prisoners while in custody or under guard, that they had better confess, is sufficient to exclude confessions made soon after.

3. That the guilt of Hightower being material to be established, in order to establish his guilt as principal, his confessions are legitimate for that purpose, but they are no evidence against the parties on trial, nor do they tend to establish their guilt.

4. That the confession of one accomplice or conspirator is no evidence against another, unless made before the completion of the original design; and if the jury believe that the confessions of Hightower were made after the killing of Landrum, and are but a relation of past occurrences, after the purpose of the conspiracy had been accomplished, they are not evidence against the defendants on trial.

5. The fifth instruction asked was a charge upon the weight of extra-judicial and casual declarations, declaring them to be the weakest and most unsatisfactory of all kinds of evidence, &c.

6. The acts and declarations of one of several conspirators (the conspiracy being first established), are not evidence against the others; but such acts and declarations must have been performed and made during the pendency of the criminal enterprise, and before its completion or abandonment, or else, being no part of the *res gestæ*, but the mere relation of a past transaction, they cannot be received by the jury as evidence to charge the other confederates.

W. P. Harris, for plaintiffs in error.

The confession of Hightower was improperly admitted; and the court not only erred in admitting over the defendant's ob-

jection, but erred in refusing to exclude them on defendant's motion, and in refusing to instruct the jury that they were not evidence to prove the participation of Thomas Lynes in the murder. Hightower was not on his trial.

As a general rule, a confession is evidence only against the party making it. Rosc. Crim. Ev., 49.

The confession of the principal, of his own guilt, has been admitted to prove simply that he did the act; but never to prove the guilt of others as participants with him. The case of Rex v. Blick, 4 Carr. & Payne, 428, was a confession by plea of guilty, and there was a connection; but this case was subsequently overruled. See Rosc. Crim. Ev., 49, 50.

These statements were made after the murder was consummated, and after Hightower was in custody, and of course could not be admitted, he not being on his trial, as evidence against his accomplices.

The declarations of co-conspirators, to be admissible against each other, must have been made *dum feret opus*, and must be part of the *res gestæ*, and made during the progress of, and in furtherance of the common design of the conspiracy.

Admissions after the whole affair has reached a conclusion cannot affect any party but the party making them. Rosc. Crim. Ev., 77; State v. Poll & Lavinia, 1 Hawks R., 442.

The court will perceive that Hightower's statement that Thomas Lynes promised him his daughter in marriage if he would kill Landrum, and that he had given her all his property, is the only direct evidence of Thomas Lynes' participation; the link which connects the conveyances of property with the murder, and went to the jury with overwhelming force. Even if there had been no effort on the part of the defense to get rid of this formidable evidence, it was the duty of the court to say to the jury that the statement was only evidence of one fact (if for that), to wit, to prove that Hightower killed Landrum, and could not be considered by the jury as any evidence that Lynes incited the killing.

These suggestions are sufficient to show the error of the court in refusing instructions asked by the defendant, which should

have been given, to prevent the jury from attaching the weight of evidence to Hightower's statements.

The confession of Thomas Lynes was not evidence against Morgan Lynes.

There was no earthly evidence of a conspiracy, if we exclude the declarations of Hightower. Com. v. Knapp, 10 Pick., 447–497.

The evidence of Thomas Lynes' confession should have been excluded. He was in custody. He was in the presence of the coroner and the jury, persons of authority; the coroner was a committing magistrate; the investigation before the jury, under our law, has the character of a criminal investigation, and may be attended with like results, arrest and commitment. The solicitations were repeated and urgent, by jurors and by a person commissioned by them. It was repeated to them, that it would be better for them to confess. This was during a trial, and after they had been told a discrepancy in their statements had been detected. One witness says they were in custody only as witnesses; but the circumstances show that they were suspected persons, and in custody. To be told, under such circumstances, that it would be better to make statements, by persons officially investigating the charge and circumstances of the murder, came clearly within the rule. 2 Phill. on Ev. (Cow. & Hill's notes), 238; 1 Dev., 229; King v. Kingston, 4 Carr. & Payne, 387; 4 ib., 570.

The error of the court, in refusing instructions asked by defendant's counsel, is palpable, and needs no comment.

T. J. Wharton, attorney general,

Insisted that the confessions of Hightower is admissible, but that, be the judgment of the court upon this point whatever it may, there is other testimony, independent of the confession, amply sufficient to sustain the verdict.

And he cited, 1 Kelly, 618; 2 Grattan R., 24, 25; 7 Blackf., 198.

HARRIS, J.:

The plaintiffs in error were indicted for the murder of one

Landrum, with James Hightower and Lemuel Lynes, the said Hightower as principal; Thomas M. Lynes, for aiding and abetting the murder at the time; and Thomas and Lemuel Lynes, as accessories before the fact, by inciting and procuring the commission of the offense.

The record before us relates only to the trial of Thomas M. Lynes and Thomas Lynes, who were convicted and sentenced, after a motion for a new trial made and overruled, to be hanged.

A bill of exceptions appears in the record, presenting the testimony and all the proceedings on the trial; and it is assigned for error here—

1. That the court erred in admitting certain copies of deeds, which were not proven and certified for record according to law.

This objection, although properly taken in the court below, and although it should have been sustained, and the deeds excluded, for want of authentication to admit them to record, and thereby to make them evidence, is not material here, as the same fact was proven by the confession of Thomas Lynes, and by other testimony.

2. It is next assigned for error, that the court admitted the confessions of Thomas Lynes.

We think there was no error in this, under the circumstances before us.

3. The court erred in admitting the statements of *Hightower* made to witness, Susan B. Landrum, *after the killing*, as evidence to implicate the other defendants.

The 4th and 5th assignments may be embraced under this general head:

The ground of error is well taken. It is well settled that, even after the conspiracy has been established, admissions of co-conspirators are inadmissible to affect their associates, unless made during the progress, or in furtherance of, or in prosecution of the unlawful design, about which they have conspired. The confession of Hightower, so far as it was introduced to establish the fact that *he* was the perpetrator of the crime, was competent; but so far as it tended to implicate others was incompetent, and should have been excluded from the jury.[1]

[1] 1 Greenl. Ev., 111; Rex v. Watson, 32 Howell's St. Tr., 7; Rex v. Brandreth, ib.,

In cases purely circumstantial, it is impossible for the court to determine what influence the testimony may have produced upon the minds of the jury. We deem it safe, as a *general rule*, to leave to the jury disputed questions of fact; and, therefore, when evidence has been improperly admitted, which may have materially operated in producing conviction, even in cases where our own minds might incline to sustain the verdict upon the testimony that was legal, the case will be reversed, that the appropriate tribunal may pronounce upon the real facts in dispute; and only in cases where the illegal testimony could not have changed the result, will this court refuse to set aside the verdict and judgment, and award a new trial.

We do not intend to express any intimation as to what should or ought to have been the verdict of the jury *without the illegal evidence;* we only intend to say that this evidence ought to have been excluded; and it will be for the jury to whom it be hereafter submitted to say whether the evidence which shall be adduced before them satisfies their minds of the guilt of the accused beyond reasonable doubt.

The 6th assignment of errors is the refusal of the court to give the 1st, 2d, 3d, 4th, 5th, and 6th instructions asked for plaintiff in error.

The first of these instructions, as also the third, fourth, and sixth, should have been given; the second and fifth were properly refused.

Let the judgment be reversed, cause remanded, and a *venire de novo* awarded.

857, 858; Rex v. Hardy, 24 Ib., 451, 452, 453, 475; Am. Fur Co. v. U. S., 2 Peters, 358, 365; Crowninshield's case, 10 Pick., 497; Rex v. Hunt, 3 B. & Ald., 566; 1 East P. C., 97, § 38; Nichols v. Dowding, 1 Stark., 81; 3 Greenl. Ev., 94; Regina v. Murphy, 8 C. & P., 297; Regina v. Shellard, 9 C. & P., 277; Rex v. Hardy, 25 St. Tr., 1; Roscoe Cr. Ev., 384, *et seq.;* Wharton Am. Cr. Law, 709; U. S. v. Hinman, 1 Baldwin, 292; Martin v. Com., 11 Leigh, 745; U. S. v. Goodwin, 12 Wheaton, 469; Glory v. State, 8 Eng., 236; Stewart v. State, 26 Ala., 44; Cornelius v. Com., 15 B. Monroe, 539; Waterbury v. Sturdevant, 18 Wend., 353; State v. Poll, 1 Hawks, 442; State v. George, 7 Iredell, 321; State v. Loper, 14 Shep., 293; Malone v. State, 8 Geo., 408.

EMANUEL AND GILES (SLAVES) *v.* STATE, 36 Miss. R., 627.

CONSPIRACY OF SLAVES.

The sufficiency of a pending indictment, which has been adjudged sufficient in the circuit court, cannot be inquired into on *habeas corpus*. That judgment, until set aside, is the law of the case. But the evidence on which the indictment was found may be adduced, and if it appear that accused should not be held in custody, he may be discharged.

Error to revise judgment pronounced by the Hon. WILLIAM COTHRAN, judge of tenth judicial district, in vacation.

Fisher and *Armstead*, for plaintiff in error.

T. J. Wharton, attorney general.

HANDY, J.:

This case comes up by writ of error, to the decision of a circuit judge refusing to discharge the plaintiffs in error, who were brought before him by writ of *habeas corpus* sued out by their owner.

It appears by the record before us, and by the return of the officer to the writ of *habeas corpus*, that he held the slaves in custody by virtue of an order of commitment, made by the circuit court of Tallahatchie county, at December term, 1858, to await their trial on a charge of advising and conspiring to make insurrection, for which they had been indicted by the grand jury of Yallobusha county.

Upon the hearing of the writ, the evidence introduced was the record of the indictment referred to and the proceedings thereupon in the circuit court, by which it appears that the indictment was sustained, as to the first two counts, but overruled as to the third; and in that condition that the indictment was pending in the circuit court. And thereupon the judge dismissed the writ of *habeas corpus*, and remanded the prisoner to custody, and that judgment is now sought to be reviewed in this court.

A preliminary objection is taken to the proceeding on the part of the state, which, we think, disposes of the case as it is now before us.

It appears that the slaves were committed upon an indictment charging that "they did unlawfully, maliciously, and feloniously conspire together, with other slaves whose names are unknown, with intent to resist the lawful authority of one John H. Mairs, who was then and there the overseer of all the slaves aforesaid, by arming themselves with divers clubs, sticks, axes, hatchets, scythe-blades, and rocks, and assembling themselves together for the purpose of resisting the aforesaid authority in said county, contrary to the statute, and against the peace and dignity of the state," &c.

The *habeas corpus* act provides that "it shall not authorize the discharge out of prison" * * * * * "*of slaves, after commitment or indictment for any felony.*" Rev. Code, 365, Art. 3. And hence it is insisted that the writ was improperly granted in this case, and should have been dismissed on that ground. On the contrary, it is said that the indictment charges no offense for which these slaves were punishable by indictment, and hence that the indictment must be a nullity.

It appears that, on demurrer, the indictment had been adjudged good and sufficient by the court in which it was pending, and that the case stood upon that judgment in that court, when the writ of *habeas corpus* was sued out. Until that judgment was set aside or reversed, it was the law of the case; and it is not competent to call it in question upon the writ of *habeas corpus*, and upon an adverse decision being made thereupon, to bring the question to this court by writ of error to that judgment. For that would be virtually to make the writ of *habeas corpus* a writ of error to the judgment of the circuit court, and call upon the judge to reverse the judgment upon the demurrer, and declare the indictment, then duly pending in the circuit court, insufficient. So the court, upon writ of error to the judgment on the *habeas corpus*, is required virtually to reverse the judgment on the demurrer, when that judgment is not before us. All this is manifestly irregular, and not to be tolerated. The judgment of the circuit court holding the indictment sufficient in law must be taken as correct, until it be reversed; and that can only be done by this court when it shall be brought before us by writ of error.

The evil consequences arising from the course of proceeding in resorting to the writ of *habeas corpus*, in cases like this, are most obvious.

1st. The judgment of the circuit court upon the demurrer, if the writ be sustained, would be reserved without writ of error extending to it. In law, it remains in force. What, then, is to be the course of proceeding of the court upon the indictment? It would be to proceed with the cause, treating the indictment as sufficient under the judgment previously pronounced. But the court would find that the prisoners had been taken from the custody of the law, and were not in the power of the court, having been discharged from prison under the writ of *habeas corpus*. Such a state of case would present a great anomaly.

But to determine the indictment to be insufficient, and to discharge the prisoners on *habeas corpus*, on that ground, and without hearing the evidence on which the charge was founded, would be attended with another serious mischief.

In such a case, the only question presented would be the sufficiency of the indictment. It might be that the indictment in its form is insufficient; and on that ground it would be liable to be quashed; and yet there might be sufficient cause upon the facts of the case to keep the prisoners in custody, to be proceeded against upon another indictment, which might be properly framed to meet the offense of which the prisoners were really guilty. And yet, in such a case, and as this case is here presented, the prisoners would be discharged, and might be placed beyond the reach of punishment, simply because the indictment was not technically sufficient to charge them with the offense intended to be charged. If such a course be justifiable upon sound principle, not only the sufficiency of all indictments for capital offenses, but the correctness of the decisions of the courts where they are pending, adjudging them to be sufficient, are subject to the determination of a judge at chambers, with power to overrule, in this informal mode of proceeding, the judgment of the proper court duly pronounced; and the same principle would give to a judge sitting on *habeas corpus* the power to annul the judgment of the circuit court upon final con-

viction, and this on the ground that the indictment was insufficient, in charging no offense.

It is clear that such questions were not intended to be embraced and determined in the proceeding of *habeas corpus*.

We are, therefore, of opinion that when there has been an indictment which has been held by the proper court to be good, and which judgment stands in full force, or when the prisoner, without such judgment, claims his discharge on *habeas corpus* merely on the ground of the insufficiency of the indictment, without the adduction of the evidence on which the indictment is founded, showing that he should not be held in custody in the matter; in either of such cases, the writ of *habeas corpus* should not be entertained.

It follows from this view that the writ of *habeas corpus* was properly dismissed, and the judgment is affirmed.

MINOR *v.* STATE, 36 Miss. R., 630.

GRAND LARCENY.

The judgment of the circuit court upon an appeal from the decision of a justice of the peace and five slaveholders, convicting a slave of an offense not capital, is final, but not revisable in the High Court of Errors and Appeals.

Error to Warren circuit court. YERGER, J.

F. Anderson and *H. J. Harris*, for plaintiff in error.

T. J. Wharton, attorney general.

HARRIS, J.:

This cause was originally commenced under the act of February, 1854 (Session Acts, 126), and tried before the justices and slaveholders, according to the provisions of that act. The plaintiff in error was convicted of the crime of grand larceny, and an appeal was prosecuted by him to the circuit court, under the provisions of the eleventh section of said act of 1854.

Another trial was had in the circuit court of said county, and the plaintiff in error was again found guilty of the offense charged against him. A motion was made for a new trial, which was refused. Various bills of exceptions, taken during the progress of the trial, and on the refusal of the motion for a new trial, appear in the record; and a writ of error is now prosecuted *here*, to reverse the judgment in the circuit court.

A preliminary question is raised as to the jurisdiction of this court, and whether a writ of error lies at the suit of a slave to this court, in cases of this character.

As indicating this view, it is said it was the object of the act of 1854 to provide a more summary, cheaper, and more expeditious remedy for the trial of minor offenses charged against slaves, and yet to secure to the slave all just protection against the errors of the inferior court, established for that purpose. Hence the right of appeal to the circuit court, and a trial there according to the usual forms in such trials in the circuit court. If, however, there lies a writ of error in *this court* in such cases, in addition to the right of appeal to the circuit court, it is said the whole object and design of the act is defeated, and an act designed to secure a speedy trial will be thereby converted into an instrument of delay, injustice and oppression to all parties interested; and, indeed, that by such construction the smallest offenses will become, in the mode, and forms, and delays of trial, much more difficult, tedious and expensive, than offenses involving the life of the slave.

To this it is answered, that the general language of the new code, extending the writ of error to *all criminal cases*, and the subsequent act of 1858, making writs of error, *in all criminal cases*, writs of right under certain restrictions, embrace as well this class of cases as any other. And this would seem to be conclusive, unless it shall be found that, from their peculiar character and situation, this inferior class of our population are excepted out of our general legislation, and only included therein when specially named, or are specially excepted by the obvious intent of the act of 1854, the act in question.

This subject is discussed by Mr. Cobb, in his Treatise on the Law of Slavery. After showing the origin and sources of

negro slavery, he comes to treat of the slave as a *person* (§ 86): "Of the three great absolute rights guaranteed to every citizen by the common law, viz.: the right of personal security, the right of personal liberty, and the right of private property, the slave, in a state of pure or absolute slavery, is totally deprived, being, as to life, liberty and property, under the absolute and uncontrolled dominion of his master," &c. Coke Litt., 116, *b*; Neal v. Farmer, 9 Georgia R., 555; The State v. Mann, 2 Dev. L. R., 265; Jackson v. Lervey, 5 Cowen, 397; Fable v. Brown, 2 Hill Chan. R., 396.

He proceeds to remark, that "no such state of slavery, however, exists in these states," and to note the modifications growing out of civilization and express legislation. He then examines the arguments of different courts on the long-mooted question, whether, in the absence of statute laws, the homicide of a slave is punishable as murder, under the general law prescribing the penalty of murder.

"By some courts," he says, "it has been held, that so soon as the progress of civilization and Christian enlightenment elevated the slave from the position of a mere chattel, and recognized him for any purpose as a person, just at that moment the homicide of him, a human being in the peace of the state, with malice aforethought, was murder. So long as he remained purely and unqualifiedly property, an injury upon him was a trespass upon the master's rights. When the law, by providing for his proper nourishment and clothing, by enacting penalties against the cruel treatment of his master, by providing for his punishment for crimes, and other similar provisions, recognizes his existence as a person, he is as a child just born, brought for the first time within the pale of the law's protecting power. His *existence* as a person being recognized by the law, *that existence* is protected by the law; and of this class of cases are the following: The State v. Tackett, 1 Hawks' R., 217; McGrew v. Cato's Ex'r, Minor R., 8; Middleton v. Holmes, 3 Porter, 424; The State v. Jones, Walker's Miss. R., 83; Kelly & Little v. The State, 3 S. & M., 518; Fields v. The State, 1 Yerger, 156; Commonwealth v. Booth, 1 Virginia Cases, 394; Dolly Chapple's case, 1 ib., 184; Commonwealth v. Turner, 5

Rand., 678; and the Same v. Carver, 5 Rand., 660; Worley v. The State, 11 Humph., 172.

"It has been objected to this conclusion," he says, "that if the general provision of the law against murder should be held to include slaves, why should not *all other penal enactments*, by the same course of reasoning, be held to include similar offenses, when committed on slaves, without their being specially named? The reply made is twofold:

"1. The law, by recognizing *the existence* of the slave, as a person, thereby confers *no rights or privileges except such as are necessary to protect that existence.* All other rights must be granted specially. Hence the penalties for rape would not and should not, by such implications, be made to extend to carnal forcible knowledge of a slave; the offense not affecting *the existence* of the slave, and that *existence* being the extent of the right which the implication of the law grants.

"2. Implications of law will always be rebutted by the general policy of the law; and it is clearly against the policy of the law to extend over this class of the community that character of protection which many of the penal statutes are intended to provide for the citizen."

At section 91 he says: "To all this reasoning and these conclusions other courts have withheld their assent; and while they acknowledge that the feelings of humanity and the dictates of conscience, enlightened by Christianity, would lead them to these conclusions, yet they have been unable, in the law itself, to feel themselves justified in so declaring it. In their view, the slave remains in a state of pure slavery *until relieved by legislative enactment*, and the provisions of these enactments are the extent of their rights and protection; that by the rules for the construction of statutes, which are adapted to regulate the conduct of citizens, slaves are not included in their provisions, *unless specifically named;* that, though murder is defined to be the killing of a human being, &c., yet rape is defined to be the carnal, forcible knowledge of a female; and if the killing of a slave be murder, the carnal, forcible knowledge of a female slave is a rape; and, further, that the fact that every slaveholding state has, by penal enactment, provided punishment for such

offenses, when committed on the persons of slaves, is a legislative declaration that such offenses were, before that time, unprovided for; that the colonies, having adopted the common law, and negro slavery having no existence in Great Britain, there could be necessarily no provision of that law in reference to it; and, consequently, the power of the master, until limited by legislation, was absolute. Neal v. Farmer, 9 Georgia R., 555; Fable v. Brown's Executors, 2 Hill's Ch. R., 395; State v. Fleming, 2 Strobh. 464; 14 Georgia R., 198; and 20 Georgia, 510.

The author then says (sect. 92): "The view we have taken of the law of nature leads us to a different conclusion from either of these, viz., that by that law, and without statutory enactment, the homicide of, or maiming, a negro slave, is prohibited, and unlawful, but that it requires statutory enactment to provide punishment for such offenses."

(Sect. 94.) The protection of the person of the slave depending so completely upon statute law, it becomes a question of importance what words in a statute would extend to this class of individuals. Generally, it would seem that an act of the legislature would operate upon every person within the limits of the state, both *natural* and *artificial*. Yet when the provisions of the statute evidently refer to *natural* persons, the court will not extend them to *artificial*.

Nor will statutes ever be so construed as to lead to absurd or ridiculous conclusions. Experience has proved, what theory would have demonstrated, that masters and slaves cannot be governed by the same laws. So different in position, in rights, in duties, they cannot be the subjects of a common system of laws.

Hence the conclusion that statutory enactments never extend to, or include, the slave, neither to protect nor to render him responsible, unless specifically named, or included by necessary implication. See Wash v. The State, 14 S. & M., 120; and The State v. Whyte and Sadler, 2 N. & McC., 175; 4 Dev., 340; 1 Scam., 178; 2 Dev., 263; 5 Rand, 678; Cobb's Law of Slavery, §§ 94, 303, 318, 320, 321; State v. Mary Hage, 1 Bailey R., 275; Grady v. The State, 11 Georgia, 253.

In Neal v. Farmer, 14 Georgia R., 579, it is said by Justice Nisbet, in a very able and elaborate opinion on this subject, that "it is theoretically everywhere, and in Georgia experimentally, true, that two races of men living together, one in the character of masters and the other in the character of slaves, cannot be governed by the same laws. Whatever rights humanity, or religion, or policy, may concede to the slave, they must, in the nature of the relation, be often different from those of the master. The forms of proceeding, and the rules of evidence for their protection, as well as the penalties for their violation, must necessarily, in many instances, be different. The civil rights of the master do not appertain to the slave. Of these, he can have none whatever. The rights personal, if they might be so designated, of the slave, are, some of them, essentially different from those of the master, and cannot, therefore, be the subject of a common system of laws. *They must be defined by positive enactments, which, whilst they protect the slave, guard the rights of the master.*" And the same views are expressed by Chief Justice Lumpkin, in Bryan v. Walton, 14 Georgia R., 198, and and 20 ib., 510.

In this state the legislature has adopted a code with express reference to the trial of slaves, defining the offenses, from murder to the lowest offenses; affixing penalties; establishing a special tribunal for their trial, wholly differing in its character from the mode applied to persons who are citizens; regulating the competency of witnesses—how summoned—the mode of compelling their attendance; and providing for the keeping and preservation of its records and papers, and for fees and costs; and finally, for appeal to the circuit court.

It can hardly be supposed, therefore, that in the great number, variety and minute particularity of the provisions, establishing a *system*, having reference to this class alone, it could have escaped the scrutiny of the legislature, if they had so intended to make provision for writs of error also; and the fact, that in an act so carefully considered, and making such important changes, no provision for writs of error to this court is made, is strongly persuasive that none was intended.

Without determining the general question discussed by the

authorities to which we have referred, we think it the manifest intent of the legislature, in all cases not capital, to make the appeal from the jury of triers to the circuit court, and a trial *there*, final; otherwise the whole scope and object of our laws, providing this new and inferior tribunal, would not only be defeated, but the very delay they were intended to prevent, would be thereby created. If the writ of error be allowed in this class of cases, then slaves, free negroes and mulattoes, for the most trivial offenses, will be allowed three distinct trials, any one of which, if found for the defendant, is final; while for capital crimes, involving life, no such provision is made, and while the superior race, the white man, has no such right extended to him, in cases of the greatest magnitude, by our laws.

Statutes will never be construed so as to lead to conclusions so absurd. Smith's Commentaries, §§ 517, 518; United States v. Fisher, 2 Cranch, 400; 7 Mass., 523; Cobb's Law of Slavery, § 94.

The same principles are applicable to the case of The State v. Patrick, submitted to us with the case under consideration.

The writs of error in these cases are therefore dismissed, for want of jurisdiction.

SIMON (A SLAVE) *v.* STATE, 36 Miss. R., 636.

HOMICIDE.

A confession by a prisoner to his jailor, on several occasions, is admissible as evidence against him, although before his confinement he had been induced to make the confession by undue influence.

Error to Copiah circuit court.

MCNAIR, J.:

The plaintiff in error was indicted and convicted in the murder of Norvall, another slave.

During the progress of the trial, Moses M. Curtis was intro-

duced as a witness for the state, to prove certain confessions alleged to have been made by the prisoner while in jail, and in the presence of the witness, who was jailor. The prisoner objected to the admission of the proposed evidence, unless the state would first show affirmatively that the confessions were free and voluntary. The witness then proceeded to state to the court that the prisoner was brought to the jail on the 24th day of June, A. D. 1857, and was delivered to him as jailor, and that he confined him in jail and chained him; "that on several occasions, when persons whom witness supposed were ignorant of Norvall's murder, would go into the jail, they would ask the prisoner, 'What he was there for?' His answers were, 'That he was there for killing Norvall; that he killed him about some misunderstanding about some molasses;'" that no caution was given to the prisoner as to the consequences of any confession he might make; and that nothing was said to the prisoner, except the question before stated; that witness was generally present when these confessions were made, but asked no questions; that these confessions were made at various times between the commitment and the next October term of the court; that the first confession was made shortly after the commitment, and the last about three weeks before the October term of the court. The witness further stated, that he was never present when the prisoner made any confessions before his commitment, nor was either of the Hartleys, or the Ellises, or Patrick present when any of the confessions were made in jail.

The district attorney then asked the witness to state to the jury the last confession made by the prisoner, which he did, as above, and the prisoner excepted.

W. H. Bondurant was also introduced to prove confessions of the prisoner, and the same objection was made as in the case of Curtis. This witness attended the jail, in the absence of Curtis, on several occasions, and he heard similar confessions as those stated by Curtis, and made under like circumstances.

It further appeared on the trial that the prisoner was pursued with dogs, and captured, on the morning Norvall was discovered to be dead (23d June, 1857); and that one of the Ellises,

in presence of the Hartleys, procured a confession from the prisoner by undue influence. See Divine v. State.

The prisoner was convicted, and he sued out this writ of error.

Wm. Vannerson and *J. A. Barlow*, for plaintiff in error.

1. In order to admit the accused in evidence against him, it is essential that the confessions were voluntary, neither induced by the hope of reward, nor the fear of punishment. The State v. Simon (a slave), not yet reported, 1 Greenleaf, 277, *et seq. et passim.*

2. To render a confession by a prisoner admissible, the prosecution must show affirmatively, to the satisfaction of the court, that it has not been made under the influence of an improper inducement. If this appear doubtful on the evidence, the confession ought to be rejected. Regina v. Warrington, 2 Lead. Cr. Cases, 167.

3. Where a confession has been obtained, or inducement held out, under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence unless from length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled. State v. Guild, 5 Halstead, 163, 179, 181.

4. And in the absence of any such circumstances, the influence of the motives proved to have been offered will be presumed to continue and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will be rejected. State v. Roberts, 1 Devreux, 259; State v. Peter, 4 S. & M., 31.

5. When a confession is made by an inferior to a superior, caution of the consequences of such confession is necessary to make such confessions admissible. The King v. Cooper and Wicks, 5 Carrington & Payne, 535, *et passim.*

T. J. Wharton, attorney general.

To show the admissibility of the confession, cited, Roscoe Cr.

Ev., 40, 49; Moore v. Commonwealth, 2 Leigh, 802; Regina v. Warrington, 2 Lead. Cr. Cases, 167; 1 Taylor on Ev., § 639.

HARRIS, J.:

The plaintiff in error was indicted for the murder of a slave. The only points of error complained of in this record are:

1. That the court below erred in allowing the confessions to go in evidence to the jury.

2. The court erred in refusing a new trial.

The first error assigned has reference to the testimony of Moses M. Curtis and W. H. Curtis and W. H. Bondurant, who had charge of the prisoner after his committal to jail, as jailors. It is insisted that these confessions were improperly admitted, because: 1. The prosecution did not show affirmatively, to the *satisfaction of the court*, that they were not made under the influence of improper inducements; and 2. Because the evidence does not show that the prisoner was "cautioned of the consequences of such confessions."

It is sufficient to say, in answer to the first objection, that the time and circumstances of these confessions made in jail show sufficiently that they were properly admitted; there is a total absence of any proof to the contrary. The record showing that this testimony went to the jury after a preliminary examination as to the circumstances of the confessions, by direction of the court, there can be no pretence that *the court was not satisfied* that the confessions were perfectly voluntary.

That no *caution* is necessary when the confessions are made to persons having no judicial authority, is settled by this court in Dick v. State, 30 Miss. R., 598.

Let the judgment be affirmed.

SIMON *v.* STATE, 37 Miss. R., 288.

HOMICIDE.

A confession is not admissible in evidence unless it is made freely and voluntarily, without restraint, and without hope of reward or fear of punishment.

Confessions made after very slight expressions, calculated to convey to the mind of

the party confessing that he would obtain any benefit if he would confess, is inadmissible; and this rule applies in cases of the confessions of the guilt of others as well as of the guilt of the person confessing.

A confession made on the same day, and a few hours after a prior confession had been made under a threat or promise, and in the presence of some of the same persons to whom the first confession was made, and without any caution having been given to the prisoner, is presumed to have been made under the influence of the threat or promise before made, and is not admissible in evidence.

The prisoner, who was a runaway slave, was caught and severely bitten by dogs. He was not suspected of the murder, and being asked by a white person why he ran away, he refused to answer; whereupon he was struck down, and warned that if he did not talk, he would be knocked down again. The prisoner was asked by the same person "what he knew about Hiram's killing Norvell," adding at the same time, that "it would be better to tell all about it." The prisoner then stated that Hiram did not kill the deceased, but he, the prisoner, did it. *Held*, that the confession was not voluntary, and therefore inadmissible.

Error to Copiah circuit court. MCNAIR, J.

It appears from the record that the prisoner was arrested about the middle of the forenoon, and in a few moments thereafter made the confession, as stated in the opinion of the court. On the same day the prisoner was taken to his master's plantation, and was there met by his master and Warren Ellis, and another person; and upon the approach of these last-named parties, Hartley, who had pursued and arrested the prisoner with his dogs, and who had been present at the former confessions, being then accompanied by his dogs and armed, remarked to Warren Ellis and the others present, "Here is the murderer," alluding to the prisoner. Warren Ellis then, without making any threat or promise to the prisoner, or giving him any caution of his making the confession, asked the prisoner if he killed Norvell, and why he did it. To this the prisoner replied, that he killed Norvell by striking him four blows on the head with the helve of an axe; that he then threw the axe-helve out of the door; and that Norvell was lying on the floor asleep, with his feet towards the fire-place.

To the introduction of this confession the prisoner objected, but his objections were overruled, and he excepted.

The prisoner was convicted, and sentenced to be hung; wherefore he sued out a writ of error, and brings his case to this court.

M. B. Harris and *Benjamin King*, for plaintiff in error.

In capital cases extreme caution should be used in the

admission of confessions of the accused, as it is hardly to be supposed that a sane man would make a confession to take away his own life. It generally proceeds from a promise or hope—from a dread of punishment—and in such cases the mind is agitated. The man may be easily tempted to wander from the truth; besides, the witnesses to the confessions may have mistaken his meaning. Wharton's Am. Cr. Law, 3d edition, 313, 314, and authorities cited.

When this confession was made, the prisoner had been chased for two miles, by negro dogs. He had suffered the infliction of a blow over the head with the butt of a whip; he had been severely bitten by the dogs; he had been struck down for refusing to speak; and had, after all these severities, traveled back half a mile, in the presence and custody of armed men, and a pack of fierce negro dogs, whose teeth had lacerated his flesh only a few moments before; and being asked in regard to the killing by the very man who had only a little while before struck him down, and being told by this man that "it would be better for him to tell the whole truth about the murder," he confessed his guilt. Confessions made under such circumstances are inadmissible. Serpentine v. State, 1 How., 256; State v. Roberts, 1 Dev., 259; Wharton's Am. Cr. Law, 3d ed., 317; 2 East P. C., 659; 2 Russ. Cr., 845; Rex v. Thomas, 7 Carr. and Paine, 345; U. S. v. Nott, 1 McLean, 499; State v. Kirby, 1 Strob., 155.

The admonition given by Willis Ellis could not have been regarded by the prisoner in any other light than as a threat. As a slave, without any caution being given him, the prisoner's confessions, even if made voluntarily, could not be given in evidence against him, inasmuch as a slave is always, when in the presence of those who have authority over him, in some sort of duress, so that in such confessions we more often get the wishes of the person in authority, or the slave's belief of his wishes, than the truth. State v. Charity, 2 Dev., 543; Spencer v. State, 17 Ala., 192; Wharton's Am. Cr. Law, 3d ed., 323.

If this confession, made to Willis Ellis and George Hartley, was inadmissible in evidence against the prisoner, all subsequent confessions are to be presumed to be under the same

influence as the first, and therefore inadmissible. Serpentine v. State, 1 How., 256; Peter v. State, 4 S. & M., 2 East P. C., 658; State v. Guild, 5 Halst., 163.

T. J. Wharton, attorney general.

HANDY, J.:

The plaintiff in error was indicted, tried, and convicted for the murder of another slave in the county of Copiah.

In the course of the trial, the state offered several witnesses to prove that the accused had made confessions of his guilt, under the following circumstances:

It appears that the accused and the deceased were the slaves of one Lot W. Ellis, and that, early in the morning of the 23d of June, 1857, the deceased was found lying on the floor of the cabin in which he slept, wrapped in his bedclothes, and speechless, having four severe wounds on the head, sufficient to produce death, and of which he soon died; and an axe-helve was found near, having on it the appearance of fresh blood, and there being a good deal of blood on the floor. A boy named Hiram, belonging to the same master, had been run away on the night previous, or early in the morning on which the deceased was found wounded. Pursuit was immediately made with dogs for the runaways, and the boy Andy was caught about four miles from the place, and the accused was pursued about two miles further, where he was found in the Bayou Pierre, up to his chin in the water, and having a scythe-blade in his hand, which, by direction of the person in pursuit of him, he threw from him to the edge of the water, and, obeying the order of the same person, came out. When he came out, he was struck upon the head a severe blow, and was seized and bitten by the dogs. About the time the dogs were taken off from him, Willis Ellis, a brother of his master, came up—being ignorant of the circumstances above stated—and he was then told by the person who pursued the accused, in the presence of the accused, that the boy had been killed, and that Hiram was suspected of having committed the act. Willis Ellis then asked the accused why he had run away, and the accused not answer-

ing, he struck at the accused with his fist, and said to him that he would knock him down if he did not talk to him. The accused was then taken back by these persons the same way that his pursuers had come, and during that time Willis Ellis asked him "What he knew of Hiram's killing Norvell;" adding at the same time, and before he answered, "It will be better for you to tell the whole truth about the matter, or about it;" and the accused thereupon said: "Hiram did not kill Norvell—I killed him;" and proceeded to say that he killed him by striking him four blows on the head with an axe-helve, as he lay on the floor in the cabin. He was then taken to the house of Willis Ellis, where soon after George Ellis came; and being told that the accused had killed Norvell, he inquired of him why he had done so; and he replied that he had done it because the deceased had told lies on him. He was then taken to his master's place, and was met by him and two other persons; and Hartley, who had pursued and taken him, told them that there was the murderer, meaning the accused; and in answer to inquiries made of him, he made substantially the same confession that he had originally made to Willis Ellis. All these statements were made by him in the presence of Hartley, who was armed, and had with him his negro dogs. He afterwards made a like confession to two other persons, in the presence of Lot W. Ellis.

Objection was made, in behalf of the accused, to the introduction of these confessions, because they were made under undue influences; but the court overruled the objection, and permitted them to be given in evidence; to which exception was taken.

The propriety of the judgment depends upon the admission of this testimony, and the instructions granted or refused by the court in relation to it.

It is a very familiar and well-established rule that a confession is not admissible in evidence, unless it is made freely and voluntarily, without restraint, and without hope of reward or fear of punishment; and so strictly has this rule been enforced, that confessions made after very slight expressions calculated to convey to the mind of the party confessing that he would obtain any benefit, or escape any punishment, if he would confess, have

been held inadmissible. And this rule has been applied to all statements made by a prisoner under such circumstances, which may charge him criminally, though in terms they apply to another person, or even purport to be a refusal to confess. Roscoe Crim. Ev., 39 (4th edit.). The reason, then, of the rule is, that the confessions are not free and voluntary, but obtained by legal constraint, and are, therefore, not to be received as evidence of the truth; and this principle applies as well to declarations made in relation to the guilt of others, so far as such declarations may be admissible, as to confessions of the prisoner in relation to himself. For the test is not whether the declarations or confessions affect the party himself, but whether they are obtained by such legal constraint as to show that they were not freely and voluntarily made.

This view of the question meets the ground on which the confessions made by the accused to Willis Ellis are contended to be admissible. That position is, that nothing was said to the accused to induce him to make confessions of his own guilt; that he was only required to tell the truth in relation to the guilt of the boy Hiram; and that he was told that "he had better tell the whole truth" in relation to Hiram's act in the matter. Conceding that this was the purport of what was said to him before he made the confessions, still it does not obviate the objection that he was thereby placed under intimidation, and induced to make the confessions which he did make. The confessions are presumed to have been made in consequence of the appeal to his hopes and fears, and cannot, therefore, be said to be the act of his own free will, and entitled to be taken as evidence against him.

But the admonition given to him was sufficiently broad to comprehend the entire subject of the killing of Norvell. When asked what he knew of Hiram's killing Norvell, he was at the same time warned that "he had better tell the whole truth about the matter, or about it." This was a distinct warning that he had better tell the whole truth in relation to the killing of Norvell; and the influence of the threat was as great to induce him to state all he knew about it, if he or any one else committed the act, as it would have been if it had been done by Hiram, as

was supposed by the persons interrogating him. He was required to tell the whole truth, whatever it might be, about the killing, and was induced to do so by what is, in law, such undue influence as renders the confession thereby obtained inadmissible.

We are, therefore, satisfied that the original confession made to Willis Ellis was inadmissible, and should not have been permitted to be given in evidence.

The subsequent confessions to the same effect were made quickly after the original confession, and when one or more of the same persons were present to whom the first confession was made; and the circumstances of time, place, and presence under which the subsequent declarations were made, are such as to show that they were made under the same constraint which caused the original confession. Peter v. The State, 4 S. & M., 31. The subsequent confessions were, therefore, also inadmissible.

Under this view of the evidence, it is unnecessary to consider the rulings of the court in relation to the instructions upon the point of the confessions.

For the erroneous admission of the confessions, the judgment is reversed, and the cause remanded for a new trial.

ALFRED (A SLAVE) v. STATE, 37 Miss. R., 296.

HOMICIDE.

The legislature of this state has the power to provide for a division of a county into two districts, and the holding of a circuit court in each; and where this is done, it may also be provided that the grand and petit jurors for each district shall be taken alone from that district in which the court is held, in which they are required to serve, and not from the whole body of the county.

An opinion formed from rumor, so fixed as to require testimony to remove it, constitutes such a bias as to render a juror not impartial, and therefore incompetent.

Where a slave confessed to a stranger in the absence of his master, and afterwards confessed to his master, and giving his reasons for committing the deed, the introduction of the first confession against the slave did not authorize him to introduce in his own favor the second confession.

A slave, indicted for the murder of his overseer, cannot introduce as evidence in his defense that the deceased a few hours before the killing had forced the prisoner's wife to submit to sexual intercourse with him, and that this had been communicated to the prisoner before the killing.

Error to Hinds circuit court. WATTS, J.

The plaintiff in error was indicted in the court below for the murder of one Coleman. He was arraigned and plead not guilty. A special *venire* was drawn, from which a jury was selected for the trial of the prisoner. The prisoner moved to quash this *venire*, because it was not taken from the body of the county of Hinds, and for other reasons. On the trial of this motion, it was admitted by the district attorney that the names of D. Simmons, C. Hardy, M. Blake, and S. Lenity, had been returned by the assessor of taxes as persons liable to jury service in Hinds county, and had been deposited in box No. 1; and that in drawing said *venire* these names were drawn, but by order of the court rejected, and not included in said *venire;* that all of these persons were householders or freeholders of Hinds county, over twenty-one years of age, and under sixty years; and that none of them had been convicted of any infamous crime; but that they all resided in township five, range one east, which is that portion of Hinds county included in the district for which the circuit court is held at Jackson. The court overruled the motion, and the prisoner excepted.

The court then proceeded to empanel a jury to try the prisoner.

Peter Stubbs was tendered by the state to the prisoner, as a juror. He was asked by prisoner's counsel "if he had ever heard of this case?" He answered that he had, "several times, from rumors." He was then asked, "Whether or not the rumors he had heard had made such an impression, or fixed such an opinion in his mind, either for or against the prisoner, that it would require testimony to remove it?" To this he answered, "that it would require testimony to remove such impression or opinion from his mind." He also stated that the opinion he had formed "had fixed bias in his mind either for or against the prisoner." The prisoner challenged the juror for cause, and the court overruled the challenge, and the prisoner excepted. Seven other jurors were examined, and were found to have formed the same opinions as Stubbs. Each was challenged by the prisoner, and the challenges overruled by the court. Four of these were challenged peremptorily by the prisoner, and the

remainder were accepted by him "under protest, reserving the exception aforesaid." The bill of exceptions recites that the prisoner, by reason of being forced to challenge peremptorily the four persons above mentioned, exhausted his peremptory challenges before the jury was completed, and if he had challenged peremptorily the others, his peremptory challenge would have been exhausted before he reached the name of the last of said jurors challenged by him peremptorily.

The jury was empaneled, and the defendant then objected to going to trial, "because neither the special *venire*, nor the regular *venire*, nor those *tales* jurors, selected without being drawn, were any of them drawn or selected from the body of the county of Hinds, in this, that township number five, range one east, was altogether excluded, which was admitted by the district attorney. He further objected to trial, because the defendant "was not being tried by the circuit court of Hinds county." These objections were overruled, and the prisoner excepted. He then went to trial.

On the trial, Dr. James testified that, some time in last February, precise date not recollected, about dark, he, in company with two other gentlemen, then in the employment of Mr. Fronden, attracted by a noise they had heard, went from Fronden's house to his stable-lot, about two hundred yards distant; that when they got into said lot, witness saw the prisoner standing near the gate, and immediately asked him what was the matter. The prisoner replied, "I have killed the overseer." There was no other person but the prisoner in sight when witness and the others arrived at the spot.

John D. Fronden testified that, "some time in February last, about dark, I went from my house to my stable, having been attracted by a noise. Dr. James and two gentlemen with him, preceded me but two or three minutes." On cross-examination, he stated that the prisoner confessed to him that he killed the overseer (Coleman), immediately after he (witness) arrived on the spot; and that this could not have exceeded two or three minutes after Dr. James' arrival there. The prisoner then propounded this question to witness: "If the prisoner had stated to him in that confession, and immediately after he had

confessed the killing, that he (the prisoner) had killed Coleman; and if so, state all he said at that time." To this question, and any answer that might be made thereto, the district attorney objected; and his objection was sustained, and the prisoner excepted.

The prisoner introduced as a witness in his behalf a slave named Charlotte, who stated that she was the wife of prisoner, and belonged to J. D. Fronden. Prisoner's counsel then proposed to prove by Charlotte that, about nine or ten o'clock in the morning of the day in which the killing took place, that Coleman had forced her to submit to sexual intercourse with him; and that she had communicated that fact to the prisoner before the killing. The district attorney objected to the introduction of this evidence, and his objection was sustained, and the prisoner excepted.

The prisoner was convicted, and sentenced to be hung, which judgment he sued out a writ of error to have reversed.

B. F. Trimble, for plaintiff in error.

1. The court below erred in refusing to quash the special *venire*, because the law (acts of 1858, page 54), dividing the county of Hinds into two circuit court districts, and authorizing the drawing of the *venire* from only one district, violates the tenth section of the bill of rights, and is, therefore, unconstitutional and void. That section, among other things, provides "that the accused, in all prosecutions, by indictment or information, hath a right to a speedy and public trial by an impartial jury of the county where the offense was committed."

This clause, rightly interpreted, forbids the legislature from restricting the accused to any district or territory less than the county; and having been manifestly designed to protect the personal rights of the citizen, should receive, in the interpretation of it, the construction best calculated to promote the design of the framers of the constitution. They have, in this clause of the section, expressly declared that "the accused hath a right to a speedy and public trial by an impartial jury," &c. Manifestly, such a construction should be placed on this clause as to secure him an impartial jury, and allow him the entire

county from which to select his jury, and which does not limit him to any particular district or neighborhood, or fractional township, which is the case in the "Jackson township," under this special law. If the opposite construction of this clause is to prevail, we may be precipitated at once into all the ancient evils of the common law practice, and be thereby prevented from having an impartial trial, which, at least, is an undoubted constitutional guaranty. The interpretation insisted on by the counsel for the state would make the guaranty of an impartial trial the sheerest mockery; for you then place it in the power of the legislature to confine the accused in such narrow limits, that he is forced, as a choice between evils, to change the venue to another county; and thus another guaranty, in the same clause, that of a right to a trial in the county "where the offense was committed," is rendered virtually inoperative, and ceases to be any longer a protection to the accused.

It is, therefore, plainly deducible that the construction contended for is necessary, if a harmonious and consistent policy is to be imputed to the framers of the Constitution; and this construction is the proper one, if the authors of the bill of rights intended therein to secure to the accused, as far as possible, an impartial jury in the trial of their cases; for to allow the legislature to prescribe the limits within which the accused is to be restricted to select his jury, may operate as a virtual denial of a trial by an impartial jury in his county at all; and in that way destroy a plain guaranty in the bill of rights. This principle has been clearly recognized by this court. Shaffer v. State, 1 How., 238.

The common law at all times secured to the accused the right of a trial in the county where the offense was committed; for, as courts of criminal jurisdiction were organized in England, no other county could take cognizance of the offense. This right has descended to us as a fundamental principle in criminal jurisprudence, and its integrity has never been assailed either in England or the United States.

2. The court erred in excluding the statement of the prisoner to witness Fronden. The rule is settled beyond controversy, that when one part of a statement or conversation is admitted,

it must all be admitted. The statement or confession of the prisoner to Fronden was, in effect and substance, but a continuation of the confession he had made to James, and a technical rule should not be applied so as to exclude it. There was an interval of but two or three minutes between the time he confessed to James and when he confessed to Fronden; and as the law has fixed no time that must elapse, and as the rule that statements made at different times cannot be brought out because one is called for, is founded in the reason that the intervening time furnishes opportunity for deliberation and invention, cannot apply in this case, because the facts show that this could not have been the case, an application here would violate the spirit and reason of the rule, and might operate grossly to the prejudice of the accused. The statement that he might have made if allowed to proceed, might have, in the opinion of the jury, amounted to justification of the deed; and if the door is to be closed on testimony in this way, by the application of rigid technical rules, without regard to their reason or spirit, the boasted humanity of the law would become a system of ingenious frauds.

3. The exclusion of the testimony of Charlotte was clearly erroneous; for anything calculated to reduce the crime of murder to manslaughter is clearly admissible. Perhaps the jury may have regarded the provocation as a justification; and while the court may say it could not legally have this effect, still the effect of testimony is exclusively with the jury, as before remarked. The mischief of the contrary rule is apparent if we consider the effect of an acquittal by a jury in criminal cases. The humanity of our law regards the negro slave as a human being with lively emotions and social instincts, and regards with as much tenderness the excesses of outraged conjugal affections in the negro as in the white man. The servile condition of the negro has not deprived him of his social or moral instincts, and he is as much entitled to the protection of the laws, when acting under their influence, as if he were free instead of bond, and the white man degrades the species to which he belongs in denying them to him.

T. J. Wharton, attorney general, *F. Anderson* and *W. P. Harris* for the state.

1. It is contended by the plaintiff in error that the legislature had no power to exempt persons residing in the first district of Hinds county from the duty of serving as jurors in criminal cases arising in the other district, which it is alleged is done by the seventh section of the act. It is insisted that the plaintiff in error was entitled to select a jury from the whole county, or, in other words, from the body of the county, and that he was deprived of this right by the action of the court under the seventh section of the act.

The only provisions of the Constitution bearing on the point are the following:

"In all proceedings by indictment or information the accused hath a right to a speedy and public trial by an impartial jury of the county where the offense was committed." Art. 1, § 10.

"The right of trial by jury shall remain inviolate." Art. 1, § 28.

These provisions do not give the accused the right to select his jury from the *body of the county*. Their object and purpose evidently were only to secure him the privilege of not being required to *leave the county* for trial, nor of being required to submit his case to persons more distant from the scene of the crime than the courts of the county. For this purpose, an *impartial* jury of the county was required. That the jury should be *impartial*, and that it should be composed of residents of the county, and not of persons from other counties, are the only requirements made in this provision; and if they are complied with, it is manifest that, in all particulars, the institution of the jury was and is subject to the supreme control and power of the legislature. This is the rule adopted in most of the states. "But on the other hand," says Sedgwick, "the guaranty is to be reasonably interpreted. It was not intended by this provision to tie up the hands of the legislature so that no regulations of the trial by jury could be made; and it has been decided that the provision is not violated so long as the trial by jury is not substantially impaired, although it be made subject to new modes, and even rendered more expensive." Sedgwick on Stat. and Const. Law, 447.

In Connecticut, where a city charter provided that the jury should be taken from the freemen of the city instead of the body of the county, it was held that the provision was constitutional, even admitting it to be an innovation upon the common law. Colt v. Eves, 12 Conn., 243. The same court, in a previous case, held that within the reasonable intendment of this clause of the Constitution, if the trial by jury be not impaired, although it might be subject to new modes, and even rendered more expensive, if the public interest demanded such an alteration, it would not be in violation of the Constitution. Beers v. Beers, 4 Conn., 535, 536.

The case of Shaffer v. State, 1 How., 243, is not a decision of the question, while the whole reasoning of the case is in favor of the position assumed by the state.

It might well have been held in that case, that when, by the statute, a *venire* was required to issue to the sheriff, commanding him in general terms to summon a given number from the county, it would be error in the clerk to insert a clause in the *venire* to summon them from persons residing as near as may be to the place of the offense, since by the statute passed, which was certainly not in opposition to the Constitution, the *venire* was to come from the whole county.

But that is a very different question from that of the power of the legislature to exempt particular persons, or particular localities in a county, for reasons of public advantage and convenience, from jury service in the county at large.

The whole legislation on this subject, both constitutional and statutory, as well as the rules of the common law, has proceeded on the idea that it was the privilege of the defendant to have the jury come from as small a space and number as possible, that space being the *visne*, and that number being the hundredors of the hundred where the offense was committed.

Judge Sharkey, in the Shaffer case, says: "The common law was particularly careful in securing to individuals a trial by the jury of the neighborhood or *visne;* and hence it required that the jury, or a portion of them, should be of the hundred in which the cause of action or offense occurred; and if they were not, it was a cause of challenge." * * * "The rule pro-

ceeded from the reason that the inhabitants of the neighborhood were more intimately acquainted with the merits of the cause of controversy, and, therefore, better prepared to decide." And again, "The rule of the common law evidently had its origin in a spirit of justice and humanity towards the accused party, and the abuse of its humane indulgence was one cause of the change. * * * The taking of our citizens from their homes and friends to be tried by strangers, without the means of a fair investigation, had, no doubt, due weight in the constitutional arrangement."

Coke states the principles of the common law, as follows: "Wherein the most general rule is, that every trial shall be out of that town, parish, or hamlet, or place known out of the town, &c., within the record, within which the matter of fact issuable is alleged, which is most certain and nearest thereunto, the inhabitants whereof may have the better and more certain knowledge of the facts." 3 Coke on Littleton, 505, b. 3, c. 9.

"Both in civil and criminal cases, the common law is very nice in requiring every issuable fact to be alleged, not only within a county, but also within a parish, town, or hamlet, or for want of either of these, some other known place of the same county, not being a hundred, which probably was excluded as too large a division, and if this rule was not observed, it might be pleaded in abatement, or otherwise taken advantage of. * * * Nor is it difficult to account for stating a particular place in the county. The principal reason was, that if issue was taken on the fact alleged, it might be tried by a jury of the *visne* or neighborhood, which our ancestors conceived to be more likely to be qualified to investigate and discover the truth than persons living at a distance from the scene of the transaction. * * * And if at least four of the hundred in which the place was situated were not included in the panel returned by the sheriff, it was a good cause of challenge to the array or whole panel, or if four of such persons did not attend to be sworn, the polls or particular jurors might be challenged." 3 Coke on Litt., 505, note 8, by Hargrave.

He adds: "However, though the ancient law continues in force as to trials for crimes, yet it hath long been deviated from

in practice. Lord Hale, taking notice that even during his time he never knew an instance of a challenge for want of hundredors in treason or felony." Ib. 506, n. 8.

It is plain, from this brief history of the matter, that the privilege of selecting a jury from the whole county was never known to the common law. It is equally clear, that after the legislation alluded to, although no challenge to the array could have been had for want of a jury of the *visne*, provided the jury were of the county, yet it certainly would not have been ground of challenge that the jury did come from the *visne*, especially in criminal cases.

It is also clear that it has always been considered a privilege, especially of the defendant in criminal proceedings, to have the jury from the place, the scene of the transaction, and from the number of those most likely to be familiar with the transaction, and also with him; but that it never was a privilege to have the jury from the whole of any county. The object of the constitutional provision clearly was to prescribe the limit within which the rule might be relaxed; that is to say, to provide that while the defendant should no longer be entitled to demand a jury of the *visne*, yet he should not be required to go from the county with his witnesses, nor be tried by a jury at a greater distance from the scene of the transaction than the county.

It follows, that if a party indicted obtains a jury which is of the county, that is, not from a greater distance than the county, and from a body of men of the county, his constitutional privilege is preserved.

That the legislature has always acted on this idea, is manifest. The system adopted for the selection of jurors, by drawing a certain number from a box, from whom the jury shall be empaneled, as well as the various exemptions provided by our statutes from jury service, are founded on the idea that a party is not entitled to select his jury from the whole body of the county, and that his constitutional privilege is preserved when the legislature protects him from being tried by any other jury than one that comes from the county (whether the body of it or not), and that is impartial.

Great numbers of persons who would otherwise be competent

jurors, are by the general statute exempted from jury service. "All officers in the executive department of the government, all judges and officers of the several courts, members of the boards of police, practising physicians, teachers of public schools, and ministers of the gospel, actually engaged in their respective employments, postmasters, keepers of public mills, and ferrymen," are so exempted. Rev. Code, 498, art. 127.

The legislature has frequently passed special laws for the benefit of various classes or bodies of men, exempting them from jury service.

So, also, all the names of persons, in any county, which are drawn from jury-box No. 1, to serve as jurors in any court, and who, at said court, are empaneled on the jury, are withdrawn from box No. 1, and placed in box No. 2, and there kept until all the names in box No. 1 have, in process of time, been exhausted. And thus, under our system, it so happens that a person charged with a criminal offense never had, and never can have, the selection of his jury from the whole body of the county. And it may happen, that when such person is put on his trial, a third, a half, or three-fourths, or nearly all the names in box No. 1 have been withdrawn and placed in box No. 2, so that he is forced to take his jury from the small number of those left.

The laws, it is true, are all passed for the purpose of dividing the jury service of the county, but they do, unquestionably, deprive every litigant, whether in a civil or criminal case, of the privilege of laying his case before a jury selected from the whole body of the county; and yet their constitutionality is admitted.

One of the main objects of the law in question, was to divide the jury service of the county, and to equalize it, or proportion it to the amount of business originating in the different districts.

If, in the sense of the constitution contended for, the party accused has the right to demand a jury from the whole county, and not a portion of it, he would equally have the right to demand that jury-box No. 1, before his *venire* is drawn from it, should have restored to it all the names in jury-box No. 2, and

are the rulings of the court in relation to the competency of certain jurors tendered by the state, and the rejection of the confession of the accused to witness Fronden, and the testimony of the witness Charlotte.

Among other jurors tendered by the state, Peter Stubbs was presented, and asked by defendant's counsel whether he had ever heard of the case. He said he had several times, from rumors. And upon being asked by defendant's counsel further, whether or not the rumors he had heard had made such an impression or fixed opinion in his mind, either for or against the prisoner, that it would require testimony of a character different from the rumors he had heard to remove such an impression, he answered that it would require testimony to remove or destroy such impression or opinion; whereupon defendant challenged said juror for cause, and the court disallowed said challenge. To which ruling of the court exception was taken, allowed, and filed, and is now here urged as error.

Under the repeated adjudications of this court, we are not permitted to regard this as an open question. It is well settled, that an opinion formed from rumor, so fixed as to require testimony to remove it, constitutes such bias as to render the juror not "impartial," and, consequently, under our constitution, to disqualify him for service. See Lewis v. The State, 9 S. & M., 118; Childress v. Ford, 10 S. & M., 30; Sam v. The State, 13 S. & M., 189; Nelms v. The State, 13 S. & M., 500; Collon v. The State, 31 Miss., 509; Williams v. The State, 32 Miss., 398; Ogle v. The State, 33 Miss., 383. This ground of error is, therefore, well taken.

We think there was no error in the rejection of the confession of defendant to Fronden, offered by the defense, nor in the rejection of the testimony of Charlotte.

For the error in the rejection of the challenge of juror Stubbs, let the judgment be reversed, cause remanded, and a *venire de novo* awarded.

GEORGE (A SLAVE) *v.* STATE, 37 Miss. R., 316.

RAPE.

Slavery, as it exists in the United States, was unknown to the common law of England; and hence its principles are inapplicable to offenses committed by or upon a slave.

Statutory enactments do not extend to or include slaves, either to punish or protect them, unless they are specifically mentioned, or are included by necessary implication.

The law of this state defining and punishing rape does not include rape committed by a slave upon a female slave, and an indictment against a slave for such offense is a nullity.

Error to Marshall circuit court. HENRY, J.

The plaintiff in error was indicted in the court below for a rape on a female slave. His counsel moved the court to quash the indictment, which was overruled. He then pleaded not guilty, and was convicted and sentenced to be hung.

J. D. Freeman, for plaintiff in error.

The crime of rape does not exist in this state between African slaves. Our laws recognize no marital rights as between slaves; their sexual intercourse is left to be regulated by their owners. The regulations of law as to the white race, on the subject of sexual intercourse, do not and can not, for obvious reasons, apply to slaves; their intercourse is promiscuous, and the violation of a female slave would be a mere assault and battery. Cobb on Slavery, § 278.

By the new code, a slave can only commit a rape upon a white woman. Rev. Code 1857, 248, § 11, Art. 58; Cobb on Slavery, 91, § 94.

By the statute of 1858, p. 180, this offense was extended to Indian women. Cobb, 263, § 302.

By the white code, the unlawful carnal knowledge of a child under the age of ten years is a penitentiary offense. The common law is, therefore, abrogated in this respect, and the punishment of death for this offense does not exist here at all. Rev. Code 1857, ch. 46, Art. 218.

Besides, the common law can have no application to the sexual intercourse of African slaves here. Cobb on Slavery, 263, § 302; ib., 266, § 307.

By our code, all offenses against slaves not charged to be capital are tried by a justice and five slaveholders. Rev. Code, § 12, Art. 68; Cobb on Slavery, §§ 307–310.

T. J. Wharton, attorney general.

HARRIS, J.:

The only point presented by this record is whether the carnal knowledge of a female slave under ten years of age, by a negro man slave, is a capital offense under the laws of this state.

Of the three great absolute rights guaranteed to every citizen by the common law, viz., the right of personal security, the right of personal liberty, and the right of private property, the slave, in a state of pure slavery, is absolutely deprived, being, as to these, under the dominion of his master, so that infringements of these rights, even by third persons, could be remedied and punished only at the suit of the master, for the injury done him in the loss of service or the diminution in value of his slave. Cobb's Law of Slavery, § 86; Coke upon Litt., 116 *b*; Neal v. Farmer, 9 Georgia R., 555; The State v. Mann, 2 Dev. Law R., 265; Jackson, ex dem., &c., v. Lervey, 5 Cowen, 397; Fable v. Brown, 2 Hill Ch. R., 396.

The condition of African slaves, in their native country, having been one of absolute slavery, including the power over life, such would be their condition here, except so far as modified by the existing laws of their new domicile, or such subsequent legislative enactments for their benefit, as may have been made here; the law of nature denying the power over life and limb being a part of the law of every civilized state. Such power never existed in any of the United States, although it required municipal law to prescribe the punishment for such offenses. Slaves, then, having no rights prior to legislative enactments, to the municipal law alone we must look for all their rights. Cobb on the Law of Slavery, § 84; The State v. Mann, 2 Dev. L. R., 268.

By the civil law, slaves were held *pro nullis*. Indeed, they are said by Mr. Taylor, in his "Elements of the Civil Law," to have been in a much worse condition than any cattle whatever. They had no head in the state, no name, no title, no register;

they were not capable of being injured, nor could they take by purchase or descent; they had no heirs, and therefore could make no will, exclusive of what was called their *peculium;* whatever they acquired was their master's. They could not plead nor be impleaded for, but were excluded from all civil concerns whatever; they could not claim the indulgence of absence *rei-publicæ causa;* they were not entitled to the rights and considerations of matrimony, and therefore had no relief in case of adultery; nor were they proper objects of cognation or affinity, but of *quasi* cognation only; they could be sold, transferred, or pawned as goods or personal estate, for goods they were, and as such they were esteemed; they might be tortured for evidence, punished at the discretion of their lord, or even put to death by his authority. Taylor's Elements of the Civil Law, 429; Cooper's Justinian, 408.

In Jackson v. Lervey, 5 Cowen, 402, Justice Woodworth, in delivering the opinion of the court, after citing these authorities, remarks that the state of slavery in this country compares with that existing under the Roman law, in many respects. The progress of society in civilization, more correct notions on the subject of moral obligation, and, above all, the benign influence of the Christian religion, have softened many of the rigors attendant on slavery among the ancients. But the rights of the slave, in respect to marriage and the acquisition and transmission of property, by way of inheritance, remain substantially on the same ground.

That the common law is not applicable to the *status* of the slave has been further illustrated and decided in North Carolina, in the cases of The State v. Boom, Taylor's R., 103; The State v. Mann, 2 Dev. Law R., 263. In South Carolina, Fable v. Brown's Ex'rs, 2 Hill's C. R., 378; The State v. Mann, 2 Hill's Law R., 453, and 2 Strobh. R., 464. In Georgia, Neal v. Farmer, 9 Georgia R., 555 (a very learned and elaborate opinion of Justice Nisbet).

In the case of Wooley v. The State, 11 Hump. Tenn. R., 173, the opinion of the court evidently is based on the supposition that the common law has no relation to the rights of slaves, and

can afford them no protection, although a contrary opinion had been held in Fields v. The State, 1 Yerg. R., 156.

With the exception of this last case, the cases of Kelly and Little v. The State, 3 S. & M. 524, and The State v. Jones, Walker's R., 83, in our state, and one or two very early cases in North Carolina, founded mainly upon the unmeaning twaddle, in which some humane judges and law writers have indulged, as to the influence of the "natural law," "civilization and Christian enlightenment," in amending, *proprio vigore*, the rigor of the common law, and on a supposed analogy between villanage in England and slavery here, the cases and text-writers are uniform in declaring that slavery, as it exists in this country, was unknown to the common law of England, and hence its provisions are inapplicable to injuries inflicted on the slave here. This view is further sanctioned by the fact, that in all the slaveholding states, special enactments have been provided for their protection, such as making it murder to kill a slave, and providing penalties for this and other offenses in relation to slaves, created by statute. See Cobb's Law of Slavery, § 92.

The question then arises, How far is the offense charged in this indictment recognized by our statute law? From a careful examination of our legislation on this subject, we are satisfied that there is no act which embraces either the attempted or actual commission of a rape by a slave on a female slave.

In the case of Bob Minor v. The State, 36 Miss. R., 630, decided at the last term of this court, it was held that statutory enactments never extend to, or include the slave, neither to protect nor to render him responsible, unless specifically named, or included by necessary implication. See Cobb's Law of Slavery, 91, § 94; Wash v. The State, 14 S. & M., 120; The State v. Whyte & Sadler, 2 Nott & McCord, 175; Neal v. Farmer, 9 Geo. R., 579.

Masters and slaves cannot be governed by the same common system of laws—so different are their positions, rights and duties.

This indictment cannot be sustained, either at common law or under our statutes. It charges no offense known to either system.

Let the judgment be reversed, and indictment quashed, and defendant discharged.*

JEFF (A SLAVE) *v.* STATE, 37 Miss. R., 321.

ASSAULT AND BATTERY WITH INTENT TO KILL.

In presumption of law, a person, in the absence of proof to the contrary, will be held to have intended the natural and probable consequences of every act deliberately done by him. But this presumption is only *prima facie* evidence of such intention. The jury should be left free to consider whether the testimony offered by the accused to rebut this legal presumption satisfies their minds of the absence of such intention.

The unlawful use of a deadly weapon by a slave, in an assault and battery on his master, employer, &c., is not of itself the same as, or conclusive evidence of, the intent to kill which constitute the gist of the offense under Rev. Code, 248, art. 59, but it is *prima facie* evidence of such intent, which will prevail, unless rebutted by the other proof in the cause.

Error to Panola circuit court. THOMPSON, J.

The plaintiff in error was indicted in the court below, for an assault and battery on one John Ballentine, a free white person, with intent to kill, and in resistance of legal chastisement. In the first count Ballentine was described as the master, and in the second as the employer of the plaintiff in error. To this indictment the prisoner pleaded not guilty.

On the trial John Ballentine testified that, in March, 1859, he had cause to correct the prisoner, and went into the garden where he was at work, and told the prisoner that he wanted to have some talk with him. Prisoner replied that he had done nothing to be whipped for. Witness caught him by the collar of the coat, and they scuffled, and witness struck prisoner on the shoulders with a walking-cane. The cane was a good-sized stick, which witness said he could probably have killed the prisoner with by striking him on the head. The prisoner put his hand in his pocket, and witness drew a pistol, and told the prisoner that he would be killed if he drew his knife. Witness had the prisoner by the collar with his left hand, and led him about fifteen paces, prisoner muttering all the time. Witness

* By ch. 62, p. 102, of the Session Acts of 1860, the actual or attempted commission of a rape by a negro or mulatto on a female negro or mulatto, under twelve years of age, is punishable with death or whipping, as the jury may decide.

told the prisoner that he would whip him or die. About this time witness' wife came running out to where they were engaged, and witness asked her to tie the prisoner with a rope which lay near by. Just then the prisoner ran his hand into his pocket, and was again told by witness if he drew his knife witness would kill him. Immediately afterwards he drew his knife and commenced to cut witness. He inflicted two slight wounds on the witness, one on his left hand, the other on the left side below the arm. Witness then let him go, and the prisoner ran off. The knife used by the prisoner was a common jack-knife; the blade was about three or three and a half inches long.

Being cross-examined, witness stated: "I am Dr. Laird's son-in-law; and the plantation on which I live, and on which the transaction took place, belongs to Dr. Laird. I have lived on the place four years. Dr. Laird lives in Memphis, Tennessee; and I have full management and control of the plantation and negroes which are near by to my house. I have never paid anything for the use of the house and plantation, but have used them as the son-in-law of Dr. Laird. The prisoner was one of the negroes working on the plantation. He was sent from Memphis to dig a cistern and paint a barn on the plantation. He had completed his work, but still remained under my control, doing whatever I directed. He had been with me about twelve months, and was as much under my control as any of the negroes on the place, but he was subject to Dr. Laird's order at any time. I had made no contract with Dr. Laird to hire the prisoner, and did not expect to pay for his services.'

Dr. Ellis, for the state, described the nature and extent of the wound on the side, as stated by the last witness, and said the knife struck a rib; and that the blow by which it was made was aimed in the right direction to produce death. He could not say how much force was used in striking the blow, and could not, therefore, state whether it would have killed Ballentine or not.

This was all the evidence.

The following charges were given in behalf of the state, to wit:

1. That malice is either express or implied. It is implied from the nature and character of the weapon used; and if the jury believed from the testimony that witness Ballentine was the master or employer of Jeff, and about to inflict legal chastisement upon him, and that said Jeff resisted said legal chastisement, and made an assault and battery upon his said master or employer with a deadly weapon, and not in necessary self-defense, then they will find him guilty as charged.

2. If the jury believe, from the evidence, that Ballentine was the master or employer of Jeff, then implied malice is sufficient to convict; and that a master or employer has a legal right to inflict legal chastisement upon his slave, and the slave has no right to resist such chastisement with a deadly weapon.

3. A master is one who has possession and power of controlling or using at pleasure; and if the jury believe, from the evidence, that Ballentine was son-in-law of Dr. Laird, in whom was the title to Jeff, but that he was placed in Ballentine's possession for an indefinite time, and free of charge, and that he had possession of him, and the right to control and use him at pleasure, then Ballentine was his owner in the sense of the statute.

4. That an employer is one who employs, uses, keeps, or engages another in service; and if the jury believe, from the evidence, that Dr. Laird was owner of Jeff, and Ballentine was his son-in-law, and that Jeff had been put into his possession, and under his control, to be governed and directed by him, and that he had used and kept him in his service and employment for twelve months, then he was an employer in the meaning of the statute; and it is immaterial whether there was any money paid for the services or not, or whether there was any definite contract as to this employment.

To the giving of these instructions for the state the prisoner excepted.

The following charges were asked by the prisoner, to wit:

1. If the jury believe, from the evidence, that Ballentine was the son-in-law of Dr. Laird, and the premises upon which the said Ballentine lived, and where the assault was committed, belonged to Dr. Laird, and that Dr. Laird had sent Jeff to his

son-in-law to do certain work on said premises, and that he remained with said Ballentine under no contract, but subject at any time to Dr. Laird's order, the said Ballentine paying nothing for the time or services of the said Jeff, then Ballentine was not the master or employer of said Jeff in the meaning of the statute under which he is indicted.

2. That the intent to kill is the essential ingredient of the offense charged in the indictment; and unless the jury believe, from the evidence, that the defendant Jeff did assault the witness Ballentine with an intent to kill him, as charged, they will find him not guilty, as charged, but they may find him guilty of an assault without intent to kill.

Which charges were given, with this modification by the court, to wit:

"That if the jury believe, from the testimony in the case, that the defendant resisted with a deadly weapon the lawful chastisement of his master or employer, and in said resistance cut his master with a deadly weapon, then the law will imply an intent to kill." To which modification the prisoner excepted.

The prisoner also asked the following instructions, which were refused, to wit:

3. It devolves upon the state to prove affirmatively the specific intent charged; and if the jury believe, from the evidence, that Ballentine was the master or employer of the defendant, and that he was about to inflict chastisement upon him, and that defendant did not cut or assault Ballentine with intent to kill, but only to extricate himself from a whipping, then the jury cannot find the defendant guilty as charged, but may find him guilty of an assault without intent to kill, even though the assault may have been made with a deadly weapon.

4. If the jury believe, from the evidence, that Dr. Laird, the father-in-law of Ballentine, was the owner of the premises on which the latter lived when the alleged assault was made, and was also the owner of the defendant, and that Dr. Laird had sent defendant to do certain work and labor on said premises, and that defendant was subject at all times to the control of Dr. Laird, and that Ballentine did not have possession of defendant under any contract, and was not to pay anything for

the services of defendant, then the said witness Ballentine was not the master or employer of defendant in the meaning of the statute under which defendant is indicted.

To the refusal of these instructions the defendant excepted.

The prisoner was convicted; he moved for a new trial, which was overruled, and he excepted and sued out this writ of error.

J. W. C. Watson, for plaintiff in error,

Argued the case orally, and cited the following authorities to show that the specific intent to kill and murder must be proven: Bishop Cr. Law, §§ 248–514; Regina v. Cruise, 34 Eng. C. L. R., 522; State v. Jefferson, 3 Harrington, 571; Ogle v. State, 28 Ala., 693; Ike v. State, 23 Miss., 525; Morgan v. State, 13 S. & M., 242; Anthony v. State, ib., 263.

T. J. Wharton, attorney general,

For the state, argued the case orally, and to sustain the conviction in the court below cited, Dan v. State, 22 Ala., 23; Jim v. State, 15 Georgia, 535; Wright v. State, 9 Yerger, 343; Anthony v. State, 13 S. & M., 264.

J. R. Chalmers, on same side,

Filed an elaborate brief.

HARRIS, J.:

An indictment was returned against the plaintiff in error for an assault upon a white person with intent to kill, which contains two counts. The first count charges that the assault was made upon the master. The second count charges that the assault was made upon the employer; and it is first insisted in argument, by counsel for the plaintiff in error, that the proof supports neither count in the indictment, in this respect. We think the proof on this point fully sufficient.

It is insisted, again, that the instructions asked by the state, and given by the court, were erroneous, because they, in effect, excluded from the consideration of the jury the "*intent*" with which the assault was made, which (under the statute, Code, p. 248, article 59, on which the indictment was framed) constitutes the gist of the offense.

This objection is well taken. The first charge given for the state, although, perhaps, not so intended, substantially instructs the jury, that if the plaintiff in error "made an assault and battery upon his master, or employer, with a deadly weapon, and not in necessary self-defense, then they will find him guilty, as charged," whether he intended to kill him or not, thereby excluding the plaintiff in error from the benefit of all testimony tending to rebut the legal presumption arising from the use of a deadly weapon.

In presumption of law, the plaintiff in error, in the absence of proof to the contrary, will be held to have intended the natural and probable consequences of every act deliberately done by him. But this presumption only amounts to *prima facie*, and not conclusive proof of such intention. The jury should have been left free to consider whether the testimony offered by the accused to rebut this legal presumption, or otherwise submitted to them on the part of the state, satisfied their minds of the absence of such intention.

The remaining instructions given for the state correctly expound the rules of law on the subject to which they relate.

It is, lastly, urged that the court erred in refusing the instructions asked for the accused.

We have already held that the proof was sufficient to support the indictment, charging that the assault was made on the master, as well as the counts charging it have been made on the employer. It will not be necessary, therefore, to notice further the first and last instructions refused. The remaining instructions refused assert the proposition that, notwithstanding the *prima facie* legal presumption that the accused intended to kill, arising from the unlawful assault and battery committed by him with a deadly weapon, yet the burden of proof rests on the state to establish by evidence, *aliunde*, the guilty intent. The modification to the second charge, asked by the accused, intended to assert that, in such case, the *onus* of proving some other intent, or the absence of all criminal intent, is imposed upon the accused. This modification was properly added, and the third instruction properly refused.

But, for the error in the first instruction for the state, the judgment will be reversed, cause remanded, and a *venire de novo* awarded.

WESLEY (A SLAVE) v. STATE, 37 Miss. R., 327.

HOMICIDE.

On the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood, as well by the accused as others, to be a quarrelsome, vindictive, and dangerous man, is inadmissible. Wharton's Am. Cr. L., 235.

When it is shown that the accused had reasonable grounds to apprehend immediate danger to his life from the deceased, the character of the deceased, in connection with previous threats, may be given in evidence as explanatory of the motives upon the defendant's action. Ib.

To make a homicide justifiable on the ground of self-defense, the danger must be either actual, present, and urgent, or the homicide must be committed under such circumstances as will afford reasonable ground to the party charged to apprehend a design to commit a felony, or do him some great bodily harm, and that there is imminent danger of such design being accomplished. Rev. Code, 601, § 34.

A homicide, where the party killing is in no danger, actual or real, and has no reason to apprehend danger, is murder.

It is the province and exclusive right of the jury to weigh the evidence, and to determine the facts of the case submitted to their consideration. Hence, it is error for the court to instruct the jury as to the weight of the evidence before them, or to charge that any fact material to the issue was proved. But if it is shown that the prisoner was not injured by the giving of such instructions, the error will not be corrected.

The good character of the accused, when satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the jury with the other facts of the case. 2 Russ. Cr., 735; Wharton's Cr. L., 235. But it is insufficient to raise a reasonable doubt in the minds of the jury, when, excluding such proof, the evidence is sufficient to satisfy them of the guilt of the accused.

Error to Monroe circuit court. ACKER, J.

The prisoner was indicted for the murder of William G. Ford. He pleaded not guilty to the indictment, and the case was submitted to the jury.

The substance of the testimony adduced on the trial is as follows:

The deceased had been overseeing for Walker, the owner of the prisoner, for about one month previous to his death; that about sunrise on Sunday morning, the 1st of August, 1858, the deceased brought the prisoner to the door of the smoke-house, and called for the key, and for a strap with which he usually tied negroes. These were brought to him. He then tied the prisoner and put him in the smoke-house, and locked the door,

and then went into the dwelling-house. He did not appear angry or excited. In a very short time, not exceeding five minutes, deceased's wife wanted to get out some meat for breakfast, and asked deceased to go with her into the smoke-house, which he did. While she was whetting a knife at the corner of the smoke-house, and about six yards from the door, deceased opened the door, and as it opened there was a noise, and deceased was heard by his wife to fall over some cotton-baskets that were near the door. The prisoner sprang so rapidly past from the smoke-house, that the wife of the deceased was unable to identify him. He immediately ran off. Deceased commenced struggling, and his wife ran to him and called for help. She told some of the negroes to go for a doctor, but they said they did not know where the doctor lived. She then sent her son for the doctor. Deceased was then assisted into the house. He had a very bad wound on the right side of the head, and died that day about one o'clock.

The prisoner, immediately after he inflicted the blow, ran to his owner's house, about a half-a-mile distant, and not finding his owner home, left, and soon afterwards, being hunted with dogs, he went again to his master's house. The wound inflicted was proven to be a fracture of the skull, and it appeared to be made by a stick, or some such instrument. There was some doubt as to whether the wound was inflicted by a hexagonal piece of timber, of sufficient size, in the language of one of the witnesses, "to knock a bull down with," or a paddle some three feet long and of sufficient thickness to inflict death, or a brick-bat. The prisoner, soon after his arrest, stated that he did not know with what instrument he struck the blow, but thought it was a piece of timber "like a hoe-helve."

It was in proof for the defense, by three slaves, that just immediately preceding the carrying of the prisoner to the smoke-house, the deceased had conceived that the prisoner had not executed properly a command to curry a mule, and had become very much enraged, and had beaten with his fist, and had kicked the prisoner with great violence, and on starting to the house with him, told the prisoner, "that he would know how to curry a mule when he had done with him."

The prisoner was proven to have been an obedient and submissive slave. The general character of the deceased was also in evidence. He was proven to be cruel and violent in his treatment of slaves; and had been discharged by one employer for cruelty to his slaves, which was rejected by the court, to which the prisoner excepted.

The prisoner was convicted, and upon his motion for a new trial being overruled, he sued out this writ of error.

The opinion of the court recites the instructions given and refused, to which exceptions were taken.

Sale & Phelan, for the plaintiff in error.

1. That a knowledge of the violent and dangerous character may be adduced in behalf of a white man, needs no authority. It is one of the most important features in determining the degree of apprehension which the prisoner may reasonably have entertained; and the same rule applies in the case of a negro. Every fact and circumstance in the assault of a white man upon a negro must inevitably awaken and keep in alarm his fears as to what the unresisted violence of the white man will wreak upon him. As his hope lessens, his fear increases. He knows he must yield to great personal suffering ere he do aught but supplicate. He feels that, at some point he may strike to save life or limb, and when submission has been yielded, and the suffering endured, and he sees the "end is not yet," but that the violence increases, and threats and preparations for deadlier assaults are made about him, a sense of danger seizes on his soul; his fear, till that time repressed by the hope of cessation, now fills his mind with dread imaginings of the evils to come; and he is then infinitely less able, rationally to calculate the degree of danger which threatens him, than the white man, under circumstances of similar or even much greater hazard. Escape and life are the resistless motives which nerve his action, and he wildly, madly struggles for refuge and safety, whether angels or devils oppose, under the mere instinct of the frightened brute fettered in the toils. The testimony shows, up to the time of his being tied and locked up, a silent submission to, and endurance of, both authority

and suffering, even beyond what humanity permitted, had punishment been deserved. But the prisoner appears to have done nothing, either "worthy of stripes," or that, by possibility, could have disturbed the glaring demon that seems to have tormented the deceased. From that point, therefore, the prisoner's fears, as to what was to befall him, rose dominant in his heart; and, in determining the degree of criminality attached to his subsequent conduct, no more reasonable ground could exist for believing that he was in danger of loss of life or limb, than a knowledge of the "violence and cruelty" of the man by whom he was then threatened, "in his management" of his fellow slaves on his master's plantation. If the slave can allege apprehended danger, every cause of apprehension incident to the white man applies to the negro. It is a principle involved in the constitution of the human mind, and uniform in its development and operation among all races.

It could have been proved, as against the prisoner, that the deceased was a man of mild, kind, and gentle disposition and conduct, in his general management of that plantation, because from such a man the prisoner could be presumed to have had a reasonable fear of his life or limb under the facts of the case. The expression implies that, with such knowledge in his bosom, he would have been presumed and required to have blended that, as a fact, in his reasoning as to what was the danger that he must repel. If so, surely he may be permitted to prove the reverse, for the purpose of drawing a reverse conclusion. Suppose it could have been proved that it was the "general" rule of the overseer, whenever he bound a negro, locked him up, and went off, shortly to return and cut his throat! Can it be said that a knowledge of the "general" management on the plantation where the prisoner lived would have been irrelevant to the issue? The testimony should have been admitted. The error was not cured by admitting testimony of the "general character of the deceased as an overseer." The prisoner may never have heard of his "general character as an overseer." He may even have heard that the deceased was a kind man. But this could not affect what he saw and knew, in his special conduct on that special plantation. If the knowledge of the general character

of the deceased is permitted to affect the criminality of the prisoner, a confirmation of that character, from the direct evidence of his senses.

2. The giving of the sixth charge for the state, by the court below, was error, because it assumes that the killing was from mere fear, and yet denies justification. Where a party kills another through mere fear, he is justified; and when this fact appears, nothing farther can be examined. The principle is without qualification. The mind of the prisoner is the test of his guilt. If his state of mind when he did the killing was not wicked, but filled by a passion or sentiment consistent with kindness and peace, but one incited to self-preservation, and under its prompting he kills, to punish him would be to punish one whose mind was guiltless. This will not be done, unless the organization for human protection demands it. Mere fear, the veriest coward, cannot be held as a crime. To do so, is to hold the great Maker responsible. To hold a man punishable for the legitimate results of a nature which God has given him, is to say that God has made a class of men whom other men decide are not worthy to live. Man shall not take away the life of his fellow-man. If he do so with an evil heart, he may rightfully be punished. If he did not kill him from a bad heart, the inquiry stops at once, in deciding upon the question of his punishment. It is not material to show under what motive, passion, impulse, or sentiment, he did the killing. The instruction denies this principle; it permits the jury to find that the prisoner did the killing through fear of his life, and does not stop the examination there, but directs their attention to other facts or subjects as necessary to completet he prisoner's defense. We contend that if the jury believed that the prisoner believed that his life was in danger, and killed from mere fear, he is justifiable.

In such a case, in deciding in reference to the presence of apparent danger, they can only look to what was the mind of the prisoner. Not what abstract reasoning upon what the facts would suggest; not what, under the facts, they believe he would have thought; not what they think the prisoner ought to have thought; but what they believe the prisoner thought at the time. This is the test which alone gets to the proper standard

in weighing his guilt. If a party had shown sufficient grounds upon which the jury would have decided, under the action of their own minds, reasonable cause of apprehension, but in getting to the state of the prisoner s mind, they believe that he did not entertain nor act upon that apprehension, they would justly convict him, because his mind is the test of his conduct. If, on the other hand, judging by their own minds, they believe that reasonable grounds did not exist for apprehension, but in getting back to the prisoner's mind, they believe that he did so think, and merely acted upon that thought, they should acquit him. Why should the actual state of mind of the prisoner, against the reasoning of the jury, convict in the one case, and not acquit in the other? If, therefore, the rule is, that a killing from fear of life is justifiable under apparent danger, and the presence or not of this supposed danger is to be tested by the belief of the prisoner at the time, then an admission that he killed from fear of life involves the farther admission that he believed the danger was present. It is impossible to conceive an admission that a party killed from fear, and a denial that he entertained apprehension. Such a paradox is an impossibility under the constitution of the human mind. They are inseparable.

The principle, therefore, is the same, with or without the addition, "if danger is apparent." The jury would have only to find the same fact under either, that the prisoner did kill through fear of his life, at the time. In finding that, it includes the presence of supposed danger to his mind.

The charge, therefore, as given, even admitting the principle correctly stated, as far as it goes, was not sufficiently definite, and was calculated to mislead the jury, in not declaring that, in deciding upon the presence of danger, they were to be governed by what they believed was the belief of the prisoner.

3. The giving of the 14th instruction for the state was error, because it assumes as proved, the most important fact in the case. This charge assumes that the prisoner did strike the blow, and also that he was then attempting to effect his escape. A court cannot assume the proof of a fact, and then charge that they constitute a crime. There is nothing hypothetical in

this charge as to the existence of the facts stated. 36 Miss., 165.

4. The refusal of the 4th charge asked for by the defendant was error. It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; "but when they entertain doubt," &c., "they may turn their attention to character. It is, however, submitted, with deference, that the good character of the party accused, satisfactorily established, is an ingredient which ought always to be submitted to the consideration of the jury, with the other facts and circumstances of the case." 2 Russ. Cr. Law, 704.

"According to the language frequently adopted by judges in their charges, it may be proved that character is, in no case, of any value. They say that, in a clear case, character has no weight; but if the case be doubtful, then the jury ought to throw the weight of the prisoner's character into the scale, and allow it to turn the balance in his favor. But the same judges will tell juries 'that in every doubtful case, they must acquit.' In clear cases, therefore, character is of no avail; and in doubtful cases, it is not wanted. * * * * * The sophism lies in the absolute division of cases into clear and doubtful, without considering character as an ingredient which may render that doubtful which would otherwise be clear. There may be cases where no character could make them doubtful. There may be others, in which evidence given against a prisoner, without character, would amount to a conviction, in which a high character would produce a reasonable doubt; nay, in which character will actually outweigh evidence which might otherwise appear conclusive. It is, in truth, a fact varying greatly in its own intrinsic value, according to its nature; varying still more in its relative value, according to the proofs to which it is opposed, but always a fact, like other facts proven in a cause, to be weighed and estimated by the jury." Wharton Am. Cr. Law, 235. The character of the accused is as much a fact for

the consideration of the jury as any other fact in issue. 31 Miss., 511.

T. J. Wharton, attorney general.

1. The proof offered of the general management of deceased on the plantation, with reference to his cruelty towards the slaves, &c., was properly excluded. On the trial of an indictment for homicide, evidence to prove that the deceased was well known, and understood generally by the accused and others to be a quarelsome, riotous, and savage man, is inadmissible. In the eye of the law, to murder the vilest and most abject of the human race is as great a crime as to murder its greatest benefactor. Wharton Am. Cr. Law, 234; State v. Field, 14 Maine R., 248; State v. York, 9 Metc., 110; State v. Hawley, 4 Harrington, 562; Queensbury v. State, 3 Stew. & P., 308. "It was not competent for the prisoner to offer evidence of the general temper and deportment of the deceased towards his overseers and tenants." o o o o o "The defendant may prove that he was acting in self-defense, and he may exhibit whatever provocation was given to him by the deceased, but he cannot set up the general reputation as a defense." State v. Tilly, 3 Ired., 424.

Even where it is the general character of the accused which is put in evidence (which can only be done by himself), it was for a long time held that it was only in doubtful cases, and cases of circumstantial evidence, that such testimony was admissible. "Such evidence ought never to have any weight, except in a doubtful case." 1 Starkie Ev., 35. "Where the testimony is positive and satisfactory to the jury, such evidence cannot avail. U. S. v. Freeman, 4 Mason, 510; Commonwealth v. Hardy, 2 Mass., 317; People v. Vane, 12 Wend., 82.

The exclusion of evidence of "specific acts of unmerciful severity (not to defendant), during the time he was on said plantation," was proper. To afford the least ground for the introduction of this evidence as part of the *res gestæ* (and it would only be under the idea that they were a part of the *res gestæ* that a court would tolerate argument on the point), the acts of

cruelty must have been done to the defendant, and not to other slaves on the plantation.

Says a learned author on evidence: "The issue is, whether defendant was guilty of the particular offense; and he advances to meet this issue with a presumption of general good character, which nothing but his own election can defeat. No matter what independent crime he may have been guilty of, or what infamy he has incurred, unless he invites the investigation himself, neither crime nor infamy can be suggested against him; and it is the pride of English and American jurisprudence that the rebuke which drove Jeffries to suicide, and Wright to jail, is still waiting for any prosecuting officer who uses his official station to procure a conviction in advance, by appeal to bad character or past offenses."

Peaceableness, or regularity of conduct and good feeling to the deceased, would, therefore, be the proper points of defense. The defendant is restricted to general evidence, it being reserved to the prosecution to put in evidence particular acts, where defendant opens the way by putting general character in issue. Wharton on Homicide, 244. Proof of *particular* transactions in which the defendant may have been concerned, is not admissible as evidence of his general good character. 1 Phill. Ev. (4th Am. ed. from 10th Eng. ed.), 764.

2. Where a slave kills his overseer, a more restrictive rule applies than in general cases of homicide. In the infliction of legal chastisement, the law will not permit the slave to resist. It is his duty to submit, or flee, or seek the protection of his master. State v. Jarrett, 1 Ired., 86; Jacob v. State, 3 Humph., 519; State v. Will, 1 Dev. & Bat., 163.

It exists in the very nature of slavery that the relation between a white man and his slave is different from that between free persons; and, therefore, many acts will extenuate the homicide of a slave which would not constitute a legal provocation if done by a white person. State v. Tackett, 1 Hawks, 210; State v. Cæsar, 9 Ired., 391.

There is no analogy to be drawn between cases where a free person is on trial for murder, and a slave for killing his master or overseer. 4 Jones (N. C.), 354.

3. The charge that, "If a party, through mere fear that his life is in danger, when there is no danger, either apparent or real, kill a party, such killing is not justifiable," is undoubtedly correct.

Nothing but actual, impending, and unavoidable danger to life can excuse a killing by the slave in such case. He takes the risk, when he slays his owner or overseer, of affirmatively establishing, by proof, the existence of such danger. Price's case, 36 Miss. R., 531.

"Who is to judge of the reasonable ground to apprehend a design to do injury? The grounds must be made to appear on the trial; and the jury must be satisfied that they were reasonable grounds upon which to found the apprehension of design to commit the felony, or to do some great personal injury. It is true the party assailed must at the time judge of the ground for his apprehension, but he judges and decides at his peril, so far as the question of entire justification is concerned." Wharton Am. Cr. Law, 392, note *a*.

The proof of express malice, under our law, is dispensed with. Rev. Code, 248, art. 59. The statute in reference to justifiable homicide does not apply to this case. Rev. Code, 601, art. 168.

4. The giving of the 14th instruction was correct. The instruction does not, as argued by plaintiff in error, assume as proved, facts which are not proved.

5. The modification of the 4th instruction by the court for the defendant was necessary properly to explain the rule of law, which was too broadly stated in the instruction as asked. Besides, said instructions, as refused, undertakes to decide for the jury the weight that should be given to the good character of the accused. In effect, it tells the jury that, in a certain contingency, that proof of itself was sufficient to raise a reasonable doubt of his guilt.

SMITH, C. J.:

The plaintiff in error was indicted and tried for the murder of one William G. Ford, and convicted. A motion was made in the court below to set aside the verdict, and for a new trial, which was overruled; whereupon the defendant excepted, and

has brought the cause before us by writ of error. The bill of exceptions taken to the judgment on the motion for a new trial, contains the evidence in the cause, and presents the grounds of error relied on for a reversal of the judgment.

A detailed statement of the evidence is unnecessary, as it will be quite sufficient to refer to only such parts of it as may be requisite to a proper comprehension of the questions raised by the assignment of errors, and discussed by counsel.

1. The first exception relates to the exclusion of certain evidence offered by the prisoner.

The deceased was, at the time of the alleged homicide, the overseer of one John A. Walker, and as such had under his control and management the accused, who was a slave, and the property of the said Walker. The commission of the homicide by the prisoner, and the facts and circumstances immediately attending the perpetration of the deed, are distinctly proved. The testimony of Mrs. Ford, the only witness, as it appears from the record, who was present at the killing, shows very clearly that the prisoner, when he slew the deceased, was in no present danger, either real or apparent, and that there was not reasonable ground to apprehend that the deceased meditated taking the life of the accused, or designed to do him some great bodily harm, and there was imminent danger of such design being accomplished.

On this state of evidence, the prisoner offered to prove the general management of the deceased on the plantation where he was the overseer, "with reference to violence and cruelty;" and (also) to prove "specific acts of unmerciful severity" committed by him while acting as such overseer, which had come to the knowledge of the witness subsequently to the killing. This evidence was excluded, and the prisoner excepted.

And this ruling of the court is assigned for error.

In the estimation of the law, to murder the most wicked is as great a crime as to murder the best and most innocent of the human species. Hence, as a general rule, it is held by all the courts that on the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood, as well by the accused as others, to be a quarrelsome, vindictive,

and dangerous man, is inadmissible. When, however, the character of the deceased is involved in the *res gestæ*, evidence in regard to it may be introduced. As, when it is shown, that the accused had reasonable ground to apprehend immediate danger to his life from the deceased, the character of the deceased, in connection with previous threats, &c., may be given in evidence as explanatory of the motives upon the defendant's action.[1] Am. C. L., 235.

The courts in North Carolina, in Alabama, and Tennessee, while acknowledging the general doctrine, as above stated, have gone a step farther, and hold that where the homicide has been committed under such circumstances as to create a doubt as to the character of the offense, the general character of the deceased may sometimes be given in evidence. The State v. Tackett, 1 Hawks, 210; Wright v. The State, 9 Yerger, 342; Queensbury v. The State, 3 Stewart & P., 315. As in the case last cited, where it was held that "if the circumstances of the killing were such as to leave any doubt whether the defendant had not been more actuated by the principle of self-defense than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated."

The principle here recognized is in conflict with the generally received doctrine on the subject, which, as we have seen, excludes evidence in regard to the general character of the deceased, except when it is involved in the *res gestæ*. But without asserting that extreme cases might not be presented, in which evidence of the general vindictive, revengeful, and dangerous character of the party slain, might properly be allowed to go to the jury as explanatory of the state of defense in which the defendant placed himself, although not strictly a

[1] Wharton's Am. Cr. Law, 641; Wharton on Homicide, 1215–1220; Pritchett v. State, 22 Ala., 39; Queensbury v. State, 3 Stew. & P., 315; State v. Tackett, 1 Hawks, 210; Wright v. State, 9 Yerg., 342; Hinch v. State, 25 Ga., 699; Dupree v. State, 33 Ala., 380; State v. Hicks, 6 Jones (Mo.), 588; Payne v. Com., 1 Metc. (Ky.), 370; De Forest v. State, 21 Ind., 23; State v. Smith, 2 Head, 743; Franklin v. State, 29 Ala., 14; Cotton v. State, 31 Miss., 504; Com. v. Seibert, ——; Com. v. Wilson, 1 Gray, 337; Monroe v. State, 5 Geo., 85; People v. Shorter, 4 Barb., 460; 2 Comstock, 197; Campbell v. People, 16 Ills., 17; Schier v. People, 23 ib., 17; State v. Jackson, 12 La. Ann., 679; State v. Hawley, 4 Harring., 452; Patterson v. People, 46 Barb., 625; Wharton's Am. Cr. Law, 1026–7.

part of the *res gestæ*, if the question here presented were tested by the doctrine laid down in the cases cited, it seems clear that the court did not err in ruling out the evidence. For here there is no pretense for the assumption that the homicide was committed under such circumstances as to create a doubt as to the character of the offense; and it is clear that the reasons upon which the rule in reference to the admissibility of evidence as to the general character of the deceased is founded, apply with greater force where it is sought to introduce evidence in regard to specific acts of the deceased, or to prove the general tenor of his conduct for a specified time, and in relation to particular subjects.

But the real question involved in the exception is not, whether, in prosecution for murder, it is competent, under any circumstances, for the defendant to prove the general revengeful and dangerous character of the deceased. It is, whether the general management of slaves on a plantation, by the deceased, was characterized by violence and cruelty, and whether specific acts of severity and cruelty committed by him, while acting in the capacity of an overseer, may be proved as circumstances going to justify a homicide by a slave, committed upon him while acting as such overseer.

Whether considered abstractly, or in reference to the facts immediately connected with the killing in this case, it is manifest that the validity of this position rests upon the doctrine, not heretofore announced in this court, that in an indictment for a homicide committed by a slave upon his master or overseer, the violent and cruel character of the overseer or master, in the government of his slaves, and specific acts of severity and cruelty committed by such overseer or master, may be considered by the jury, in determining the guilt or innocence of the accused, although the killing may be proved to have occurred under circumstances which show that the party charged was, at the time, in no present danger, real or apparent, and that he had no reasonable ground for apprehending danger to life or limb from the deceased, or that the deceased designed to take his life, or do him some great bodily harm, and there was imminent danger of such design being accomplished. In other words, that

a slave, charged with the murder of his master or overseer, may excuse or justify the deed upon the ground that, being about to be chastised by his master or overseer, or being apprehensive that he would be punished for some real or imputed delinquency, from the known violent and cruel character of the deceased in the management of slaves, and from the fact that he had been guilty of particular acts of great cruelty upon other slaves under his charge, he had good reason to apprehend, and, in fact, did believe, that some great bodily harm would be inflicted upon him, or that his life would be taken.

It is scarcely necessary to say that this proposition is utterly untenable. It lays down a rule which, if recognized by the courts, would produce the most disastrous consequences. If the slave, when he is about to be chastised, or has just reason to apprehend that he will be subjected to cruel and unmerited punishment, be informed that, in order to escape, he may innocently slay his master or overseer, if he really believes that, by the apprehended punishment, his own life will be taken or greatly endangered; and that, to make good his defense in a court of justice, it will be sufficient to prove the general violent and cruel conduct of the deceased in the government of slaves, the slave population of the state will be incited to insubordination and murder, and the life of the master exposed to destruction, either through the fears or by the malice of his slaves.

But the principle contained in the proposition, when applied to homicides committed by white persons, is equally untenable.

To make a homicide justifiable on the ground of self-defense, the danger must be committed under such circumstances as will afford reasonable ground to the party charged to apprehend a design to commit a felony, or to do him some great bodily harm, and that there is imminent danger of such design being accomplished. Rev. Code, 601, § 34. Hence the mere fear, apprehension, or belief, however sincerely entertained by one man that another designs to take his life, will not excuse or justify the killing of the latter by the former. Where the danger is neither real nor urgent, to render a homicide excusable or justifiable within the meaning of the law, there must, at the least, be some attempt to execute the apprehended design, or there

must be reasonable ground for the apprehension that such design will be executed, and the danger of its accomplishment imminent. State v. Scott, 4 Iredell, 409. A party may have a lively apprehension that his life is in danger, and believe that the ground of his apprehension is just and reasonable; but if he act upon them, and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been of the reasonableness of the grounds upon which he acted. That is a question which the jury alone are to determine.

2. The next objection applies to the sixth charge granted in behalf of the state. The charge is in these words: "If a party, through mere fear of his life, there being no real or apparent danger, kill another, it is not justifiable."

In the argument of the exception to this instruction, it was contended, first, that the charge was erroneous, because it admits or assumes that the homicide in question was, in point of fact, committed through mere fear; and, second, because it denies that a killing through mere fear is justifiable.

If counsel are correct in their construction of the charge, it is certainly erroneous, but not for the reason assigned.

It would have been error if the court had said to the jury, the prisoner on trial committed the alleged offense through fear of his life; but a killing from mere fear, where the party killing is in no danger, either real or apparent, is murder; in other words, a homicide where the party killing is in no danger, actual or real, and has no reason to apprehend danger, is murder. An instruction bearing such a construction would be something more than a charge upon the weight of evidence. It would, in effect, be a command to the jury to convict the prisoner.

Such, however, is certainly not the proper construction of the charge. It lays down a principle of law for the guidance of the jury in the most abstract form, leaving them perfectly free to weigh the evidence, and to determine whether or not the homicide was committed through mere fear of life. There is, hence, no objection to the charge, unless the position be tenable that a killing through fear or apprehension that the party's life is in danger, where, in point of fact, there was no real or actual danger, and no reason to apprehend any, is justifiable.

What we have said in reference to the first assignment of errors is a sufficient answer to this objection.

3. The next error assigned is, that the court erred in giving the 14th instruction requested by the district attorney, which is in these words: "That whether the defendant, at the time he struck the blow, intended to kill the deceased, or only intended to knock him down to effect his escape, in either case he is guilty of murder, if he used such means as were calculated to endanger the life of the deceased, or to do him some great bodily injury."

The objection to this instruction is, that it assumes as proved an important fact in the case, and hence is a charge upon the weight of evidence.

It is the peculiar province and exclusive right of the jury to weigh the evidence and to determine the facts of a case submitted to their consideration. And the law is careful to guard against any invasion of their authority by the court. It is hence error for the court to instruct the jury as to the weight of the evidence before them, or to charge that any fact material to the issue was proved. For the same reason, it is improper for the court to assume as proved any fact involved in the issue, and make such assumption the basis of an instruction; for such an act would, in effect, be a charge upon the weight of evidence. But it is not for every error committed by the circuit courts, in charging, or in refusing to charge, the jury, that this court will reverse. It is only after an examination of the whole record, and when it appears that the party complaining has either been injured, or may have been injured, by an erroneous instruction, that this court will interpose and correct the error.

In the case before us, the fact that the blow was given by the defendant, which caused the death of the deceased, was clearly and distinctly proven. Not a particle of evidence was offered which raised the slightest doubt as to the hand which dealt the fatal blow. It was certainly not a controverted fact, or one about which it was possible for the jury to *doubt*. Under these circumstances, it cannot be asserted that the jury were misled, and, therefore, that the defendant was injured by the instruction. On the contrary, it may, with certainty, be

affirmed that, in respect to the agent in the homicide, the jury were not, and could not have been influenced by the instruction. Such being the case, it would be to defeat instead of promoting the true purpose of the law, to set aside the verdict for this cause.

4. The court, in behalf of the prisoner, was requested to instruct the jury, that "the character of the accused, if proof has been made upon the point, is as much a fact for the consideration of the jury as any other fact in the case; and if the jury should have been satisfied of his guilt, if no proof had been made of the character of the prisoner, yet if it has been proved that the prisoner was an obedient, peaceable and submissive slave, up to the time of his alleged offense, the proof of such a character may, of itself, be sufficient to raise a reasonable doubt of his guilt, of which the jury are the judges.

This charge was refused, and the following instruction was given in lieu of it: "That the character of the prisoner, if proof has been made on the point, was as much a fact for the consideration of the jury, as any other fact in the case; but no character, however good, is sufficient to authorize the jury to find the prisoner not guilty, if the proof is otherwise clear and satisfactory, that the defendant is guilty as charged.

The refusal of the court to give the former, and the giving of the latter, is next assigned for error.

We perceive no objection to the substituted charge of which the prisoner had a right to complain, and the instruction asked for him we think was properly withheld.

No precise or definite rule has been laid down by which to determine the weight to which, in prosecutions of this character, evidence of the good character of the accused is entitled. "Juries," says Sir William Russell, "have been generally told, that where the facts proved are sufficient to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but, when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted, that the good character of the party accused, when satisfactorily established by competent witnesses,

is an ingredient which ought always to be submitted to the jury, with the other facts and circumstances of the case." 2 Russ. on C., 785. This view of the subject is sanctioned by high authority. Am. Cr. L., 235. And perhaps it is the better course, in no case to withdraw from the consideration of the jury, the evidence in regard to the good character of the accused. But while the good character of the accused is an ingredient which may be submitted to the jury, it would be going a great way too far to lay it down as a fixed rule, that proof of good character is sufficient to raise a reasonable doubt in the minds of the jury, when, excluding such proof, the evidence is sufficient to satisfy them of the guilt of the accused. This is the principle contained in the instruction, and for that reason there was no error in refusing it.

5. The fifth and last exception is, that the motion for a new trial was improperly overruled.

The only question raised under this assignment is, whether or not the evidence was sufficient to warrant the finding of the jury. And it is only necessary to say, without going into a minute examination and comparison of the testimony, that it was amply sufficient to sustain the verdict.

Judgment affirmed.

THOMAS *v.* STATE, 37 Miss. R., 353.

ILLICIT RETAILING OF INTOXICATING DRINKS.

Upon a purchase of one gallon of spirituous liquors, a less quantity only of which is delivered at the time, the residue remaining in the possession of the vendor, and not separated from the bulk in the barrel from which the part delivered was taken, it is in law a sale of only the part delivered; and where these circumstances are proven, the intent of the vendor is immaterial.

It is not incumbent on the state, in an indictment for retailing without license, to show that the defendant had no license; if the defendant relies on that fact for his defense, he must prove it.

The fact that the court gave instructions to the jury in behalf of the state, on its own motion, is no ground of error.

Error to Tippah circuit court. SCRUGGS, J.

John W. Thompson and *Fulton Anderson*, for plaintiff in error, and

T. J. Wharton, attorney general,
Argued the case orally.

HANDY, J.:

This was an indictment for selling spirituous liquors in less quantities than one gallon, without license, and contrary to the statute; upon which the defendant was convicted.

The only testimony in the case material to the issue, is that of Smith, a witness in behalf of the state, and to whom the spirituous liquor is charged to have been sold. He testified, in substance, that he had several times purchased spirituous liquors of the accused within a year preceding the time of finding the indictment; that he purchased it by the gallon, and never purchased any from the accused in less quantities than a gallon; but he sometimes took it away by the gallon, sometimes by the bottleful, and sometimes by the tumblerful, but most generally by the gallon or half-gallon; that he, on one occasion, bought one gallon of whiskey from the accused, and took away one pint or bottleful, with the understanding that he was to call for the residue of the gallon in a short time, which was not then drawn from the barrel, or separated from the bulk of the whiskey in the barrel, and that he afterwards called and got the residue; and that it was left for the convenience of the witness, who could not conveniently take away the gallon at the time. On cross-examination, he stated that the accused never sold him any spirituous liquor in a less quantity than one gallon; that the liquor purchased by him of the accused was all purchased by him in good faith by the gallon, without any intention on his part to evade the law, and that, as far as he knew, or had reason to believe, the accused sold the same to him by the gallon in good faith, and without any intention to evade the law, and that the accused suffered him to leave portions of the gallon, whenever that was done, for the accommodation and convenience of witness alone, and not for the purpose of evading the law.

The first error assigned, applies to the first instruction given at the instance of the state, which is in these words: "If the jury believe, from the evidence, that the defendant sold Smith

spirituous liquor, stating that he sold by the gallon, but delivered it in less quantities than a gallon, with intent, on the part of the defendant, to evade the statute, they will find him guilty; and proof, to the satisfaction of the jury, that the defendant delivered the spirituous liquor by the quart, half-gallon, or other quantities less than one gallon, together with proof that when the liquor was sold, and a part delivered, the balance remained in the barrel with defendant's liquor, are circumstances from which the jury may infer the defendant's intent to evade the law." And again: "If the jury believe that the defendant delivered to Smith spirituous liquor in a less quantity than one gallon, under a sale, he is guilty, although he agreed to sell by the gallon, if the liquor delivered was drawn from the barrel of defendant, and the balance was left in the barrel of defendant."

Propositions the reverse of the rule here stated were contained in the instructions asked in behalf of the defendant, and refused by the court.

The question is thus presented whether, upon a purchase of one gallon of spirituous liquor, a half-gallon or less quantity only of which is delivered at the time, the residue remaining in the possession of the vendor, and not separated from the bulk in the barrel or other vessel from which the part delivered was drawn or taken, it is, in law, a sale of the gallon, or only of the less quantity delivered. And the law is well settled that it is a sale only of the part delivered. White v. Wilks, 5 Taunt., 176; 2 Kent's Comm., 496 (3d edit.); Ingersoll v. Kendall, 13 S. & M., 615. And it does not come within the rule applied to a sale of a *specific* and *separate chattel*, where an actual delivery is not necessary, as in the case last cited, and in Garland v. Stewart, 31 Miss., 314.

Consequently, the rule upon the point was correctly stated to the jury at the instance of the state.

It is further objected to the first instruction, that it directs the jury upon the weight of evidence; but we do not think the objection well founded. It directs the jury, substantially, that if there was proof, to their satisfaction, that there was an alleged sale of liquor by the gallon, but a delivery of it in less parcels, the residue remaining in the barrel, and not separated from the

bulk in the defendant's possession, the jury might infer from these circumstances an intent to evade the law. This was correct. But it was immaterial, for it only instructed as to the point of intent. If the alleged sale of a gallon, with a delivery of a less quantity, under the circumstances stated in the instruction, was, in law, the sale of a less quantity than a gallon, it is immaterial what was the intent of the seller. It was, in fact and in law, the sale only of a less quantity than a gallon, and that was illegal, and rendered the seller liable to the penalties of the law, whatever may have been his intention. So that this part of the instruction was immaterial, and could not, in law, have operated to his prejudice.

We think, therefore, that there is no error in these instructions of which the defendant can complain.

Another error assigned is the rule stated in the second instruction in behalf of the state, that it was not necessary for the state to prove that the defendant had not license, but that it was incumbent on him to show that he had license to sell. The contrary of this was asked in behalf of the defendant, but refused by the court. In these rulings the court was clearly right, as has been frequently held by this court.

It is also assigned for error that the court, of its own motion, gave an instruction to the jury upon the question of sale above mentioned. But it does not appear how that instruction was given, nor that it was given without the motion of the district attorney, nor that any objection was made to it, on the ground here suggested. If, however, the fact appeared of record as suggested, and objection had been made on that ground, it would be no just ground for reversing the judgment, for the instruction but states the same rule in substance upon the question embraced in it, as was also given in the instructions in behalf of the state.

The remaining error assigned is, that the verdict was contrary to the evidence. When this point was first considered by us, we were of opinion that this assignment was well taken, treating the case as an indictment charging *an attempt to evade* the law; and so considering it, we thought it clear that the evidence showed that the defendant did not sell the spirituous liquor to

the witness in the manner stated by him, with intent thereby to evade the statute. But it is an indictment against *selling* spirituous liquors in violation of the statute. The fact charged is fully proved in law; and the intention with which it was done is not a matter to be taken into consideration. He has, in fact, violated the law, which he was bound to know, and must be held to the legal consequences of his act, whether he knew the law or not, or whatever may have been his intention.

In this point of view the evidence fully sustains the verdict, and this assignment of error cannot prevail.

Let the judgment be affirmed.

ROCCO v. STATE, 37 Miss. R., 357.

RETAILING.

The overruling of a demurrer to the replication of the state, when the replication is afterwards withdrawn by the district attorney, is no ground of error.

The withdrawal of a replication by the state, after a demurrer to it has been overruled, is no error.

Under the statute, Rev. Code, 615, Art. 262, the indictment may be amended by striking out certain descriptive words from it.

If the offense charged against a party in a second indictment *be identical* with an offense charged against the same party in a previous valid indictment, upon which he was tried and convicted or acquitted, that judgment will be a bar to the second indictment; and it will be presumed that all the evidence that could be adduced in support of the former indictment was adduced on that trial.

But in order to render a former acquittal or conviction successful, it is necessary for the defendant to show *the record* of the former proceedings and conviction, and prove *the identity of the offense* and of the *person* charged in the two indictments.

Where a former indictment charged the defendant with retailing spiritous liquors to *John Smith*, and he was subsequently indicted for retailing to John Hobart, a plea of *autrefois acquit* under the first indictment is not sufficient to bar his conviction under the second.

Under the Rev. Code, 614, Art. 252, a grand juror who found the bill of indictment is a competent witness for the state, on the trial of it.

Error to Yazoo circuit court. HENRY, J.

This was an indictment in the court below for retailing vinous and spirituous liquors, without license, to one John Hobart, and to divers others to the grand jurors unknown, in the first count. The second count contained the same charge, with the additional averment that the prisoner "suffered and permitted the liquors to be drunk in his house and on his premises."

To this indictment the prisoner pleaded specially a former conviction for the same offense, and set out with his plea the record of his conviction, from which it appeared that at the same term of the court at which the present indictment was found against him, in the first count of which he was charged with retailing vinous and spirituous liquors in less quantities than one gallon, and without license, to "John Smith and divers other persons to the grand jurors unknown;" and in the second count he was charged, in the same language, with the additional averment, "that he suffered and permitted the same to be drunk in his house and on his premises." It also appeared that he had been convicted on this last-mentioned indictment, upon his plea of guilty, and had been sentenced.

The replication of the district attorney to this plea denied that the prisoner was convicted "of the particular offense here charged, but averred that he was convicted of a similar offense in the sale of liquor to one John Smith, and not to one John Hobart, for which he is now indicted, and for which he has never been tried or convicted, and which particular offense was not embraced or inquired into in the case in which the defendant stands convicted of record, and this the state prays may be inquired into."

To this replication the defendant filed a general demurrer, which was overruled.

The prisoner then rejoined as follows: "The defendant says that he was not convicted of a similar offense in the sale of liquor to one John Smith, as averred in the replication; and this he prays may be inquired of by the country."

The district attorney then, after the jury was empaneled, but before the papers were read, or any evidence submitted to the jury, asked and obtained leave to withdraw his replication, and file a new one; to which the prisoner excepted.

The district attorney then filed the following replication: "This day came the state, by the district attorney, and for replication to the answer of the defendant, says, that it is not true that the defendant was, on the first day of June, 1859, in this court tried and convicted upon an indictment for the same identical offense for which he is indicted and arraigned

for trial in this case, as appears of record in this court; and this the state is ready to verify by the record. Wherefore the state prays judgment of this court against said defendant on said plea."

The cause was tried upon the issue thus joined before the judge, and on the trial the defendant read in evidence the record of his former conviction, as set out by his plea; and upon this evidence, the court, as the record states, "overruled the plea."

It further appears from the record that the district attorney asked and obtained leave from the court to amend his indictment by striking out the words, "and to divers other persons unknown to the jurors," in both counts; but at what stage of the proceedings this occurred is not known. To the amendment thus made the prisoner objected, and excepted.

The prisoner plead not guilty, and the case was submitted to the jury at the same term of the court that the indictment was returned.

On the trial the district attorney introduced Wm. R. Wren, one of the grand jury who found and returned into court the bills of indictment against the prisoner.

The district attorney then asked said witness the following questions: 1st. "If the bill of indictment in this case was found by the said grand jury at the same time the bill of indictment against the same defendant for selling spirituous liquors to one John Smith, and to divers other persons, was found?" 2d. "Whether John Hobart was before the grand jury before the indictment against Rocco for selling spirituous liquors to John Smith and others was found by said grand jury?"

The prisoner objected to these questions, "because what transpired in the grand jury room was not legal evidence;" but the court overruled the objection, and the defendant excepted.

The evidence on the trial before the jury is not set out; but it seems, from the foregoing questions propounded to witness Wren, and the instructions asked by both parties, that the jury tried these two questions: 1st. Whether the defendant had sold vinous and spirituous liquors to John Hobart, as charged; and 2d. If he did so sell, whether such offense was the same act of

which he was convicted under the indictment charging a sale to Smith?

At the instance of the district attorney, the court charged the jury as follows:

1. If the jury believe, from the evidence, that the defendant, at any time within one year before the 23d day of May, 1859, and in this county, sold vinous and spirituous liquors in a less quantity than one gallon, without a license so to do, to John Hobart, then the jury are bound to convict him, unless the jury shall believe, from the evidence, that the defendant has been convicted of this very identical offense of so selling to John Hobart; and that the offense of which he stands convicted is one and the same offense for which he now stands on trial; and proof that the offenses are of the same character and the same kind is not sufficient, unless it shows that the two offenses are identically one and the same."

2. In offenses of this character, every separate act of sale is a separate and distinct offense in law, for which the party may be indicted; and if so indicted and convicted for one only, that is no bar to a conviction for another.

3. The burden of proof is on the defendant to show, by evidence satisfactory to the jury, that the defendant has been convicted for selling the liquor to Hobart, and that it was that offense for which he was convicted in the case in which he was indicted for selling to John Smith and to others, and no other offense; and unless the defendant has done so, the jury must convict, if they believe him guilty of the offense charged.

4. The dates being the same in both indictments is immaterial, and does not prove that they are one and the same offense.

The following instructions, asked for by the defendant, were refused, to wit:

2. That a man cannot be twice put in jeopardy for the same offense; and if the jury believe, from the evidence, that the defendant may possibly have been once convicted legally of the same offense for which he is now on trial, they must acquit.

4. Under a proof of a sale of vinous and spirituous liquors to John Hobart in this case, if it had been introduced on the trial of the case, the record of which is before the jury, the de-

fendant could have been legally convicted in that case, and the former conviction would have been a bar to this prosecution.

The jury found the prisoner guilty, and he was sentenced by the court. From this judgment he sued out a writ of error, and brings his case to this court.

Gibbs and *Wilkinson*, for plaintiff in error.

The court below erred in overruling the demurrer of the defendant to the replication of the state to the plea of *autrefois convict*. The replication is insufficient, first, because it is no answer to the plea; and secondly, because it has no legal conclusion. The court also erred in permitting the replication to be withdrawn, and a new replication filed, after issue joined. No amendments are allowed except to the indictment. Rev. Code, 614–16. And as such amendments were not allowed at common law, the courts cannot extend the statute beyond its plain terms. But even if it could be so construed as to extend to all the pleadings, yet, in this case, the amendment was not proper at the time it was made; that is, after issue joined. So it was improper to permit the amendment to the indictment after the jury was sworn. The statute is express that all objections to any indictment shall be made before the issuance of the *venire* in capital cases, and before the jury shall be empaneled in all other cases, and not afterwards. Rev. Code, 616, art. 268.

The record of the conviction of the defendant, set forth in his special plea, was a bar to a conviction under this indictment. The plea of *autrefois convict* and *autrefois acquit* are the same in principle, and rest on the maxim that "no man shall be more than once in peril for the same offense," which has been incorporated into our declaration of rights, sec. 13. A legal conviction or acquittal in any court of competent jurisdiction, if the indictment be good, will be sufficient to preclude any subsequent proceedings before every other court. Commonwealth v. Cunningham, 13 Mass. R., 245; Commonwealth v. Goddard, ib., 457; Wortham v. Commonwealth, 5 Randolph, 669; Bayley's cases, 1 Va. Cases, 188, 248, 258.

The true test to ascertain whether a plea of *autrefois* be a

good bar is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first. People v. Barrett, 1 Johns., 66; Commonwealth v. Cunningham, 13 Mass., 245; Hite v. State, 9 Yerger, 357; Commonwealth v. Halstal, 2 Boston Law R., 177; Archbold's Cr. Pl. (by Jervis), 82; Commonwealth v. Curtis, Thacher C. C., 202; Commonwealth v. Goodenough, ib., 132; Gerard v. People, 3 Scam., 363; State v. Ray, Rice, 1; State v. Risler, 1 Richardson, 219.

The rule undoubtedly is, that if the prisoner could have been legally convicted on the first indictment, upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment. And it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not. Rex v. Sheen, 2 Carr. & Payne, 634; Rex v. Clarke, 1 Brod. & B., 473; Rex v. Embden, 9 East, 437.

If the charge be in truth the same, though the indictments differ in immaterial circumstances, the defendant may plead his previous acquittal, with proper averments; for it would be absurd to suppose that, by varying the day, place, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the right of the defendant, and subject him to a second trial. Hite v. State, 9 Yerger, 357; Keeler, 58; 1 Leach, 448; Rex v. Embden, 9 East, 437; 1 Archbold's Cr. Pl. and Ev. (by Waterman), 112, and notes.

The court below also erred in suffering the questions to be propounded to witness Wren. This witness was a member of the grand jury which found both bills of indictment. He was first asked if the two bills of indictment were found at the same time. This question is liable to many objections. It did not go to prove the issue before the jury, which was then on the plea of not guilty, and the finding of two or a hundred indictments was no proof of guilt. He was also asked as to what witnesses were before the grand jury, and at what time, in order to prove that the two bills of indictment were found upon the testimony of different witnesses; and it is to guard against this very thing that the plea of former convic-

tion is allowed. If it was necessary to sustain that plea, that both bills should be found at the same time, by the same grand jury, upon the testimony of the same witnesses, we imagine the plea would never be filed in any case.

Burrus & Armistead, on same side.

T. J. Wharton, attorney general,

Relied on an elaborate brief of R. S. Hudson, Esq., the district attorney who prosecuted in the court below. In this brief the following authorities, to sustain the decision of the court below on the plea of *autrefois convict*, were relied on: 1 McCord, 355; Miazza v. State, 36 Miss., 613; State v. McBride, 4 McCord, 332; 1 Richardson, 90; 15 Verm., 290; 21 ib., 91; 9 Metc., 569; 8 ib., 529; 17 Wend., 475; 8 S. & M., 576; 24 Pick., 374; 3 Stark. Ev., 1529; 1 Chitty Cr. Law, 238; 4 Pick., 258; 13 ib., 539; 4 Denio, 235; 5 How., 590; State v. Combs, 32 Maine, —; State v. Ainsworth, 11 Verm., 91; 21 ib., 91; Smith v. Commonwealth, 7 Gratt., 593; Hite v. State, 9 Yerger, 357; 1 Leach, 404; 6 Dana, 295; 4 Pick., 252; Noonan v. State, 33 Miss., 373; 3 Harr., 547; 28 Miss., 637; 1 Strange, 707; 1 N. H., 268; 12 Conn., 54; 1 Swann, 34; 2 Hale P. C., 244; Miller v. State, 33 Miss., 360; Rex v. Sheen, 2 C. & P., 634; 1 Green, 361; 2 Hawks, 98; 5 Porter, 523; 9 C. & P., 364; 1 Rice, 1; 1 Comstock, 379; 5 Harris, 126; 1 C. & M., 328; 2 Tyler, 390; 2 Mass., 409; 1 Va. Cases, 164; 1 Carolina Law Repository, 519; 1 Walk., 208; 1 East P. C., 522; 12 Pick., 505; 9 East, 441; 1 Green, 361: 7 Conn., 54, 414; 5 Halst., 293; 7 Dana, 219; 8 Leigh, 721; 7 S. & M., 423; 12 Ga., 293.

HANDY, J.:

The plaintiff in error was indicted for unlawfully selling and retailing vinous and spirituous liquors in less quantities than one gallon, without license. The indictment contained two counts, the first charging that the defendant *sold* the vinous and spirituous liquor to *John Hobart*, and divers other persons to the jurors unknown, and the second that he sold vinous and spirituous liquor to *John Hobart* and divers other persons to the

jurors unknown, and *permitted the same to be drunk on his premises.*

The defendant pleaded a former conviction for the same offense, and incorporated in the plea a transcript of the record and proceedings in the same court, upon an indictment against him, charging him with selling unlawfully, and without license, vinous and spirituous liquors in a less quantity than one gallon, to *John Smith* and divers other persons to the jurors unknown; and also, in a second count, with selling vinous and spirituous liquors to *John Smith* and divers other persons unknown to the jurors, and permitting the same to be drunk in and about his storehouse; to which indictment he appeared and pleaded guilty, whereupon judgment was rendered against him. To this plea a replication was filed on the part of the state, denying that the defendant had been convicted of the same offense charged in this indictment. A demurrer was filed to this replication, which was overruled, and the defendant rejoined, taking issue upon the replication. The district attorney then asked leave to withdraw the replication, which was granted, the defendant excepting, and a new replication was filed, in a more formal manner, denying that the conviction pleaded was upon the same offense charged in this indictment, which was done before the case was submitted to the jury. Upon the issue taken upon the defendant's plea, judgment was then rendered by the court that there was no such record of conviction as set forth in the plea; and it was overruled, and the defendant required to answer over to the indictment.

Upon motion of the district attorney, the court allowed the district attorney to amend the indictment by striking out the words "*and divers other persons to the jurors unknown*," in both counts of the indictment, the defendant excepting. A plea of not guilty was then filed, and upon the trial of that issue a verdict was rendered against the defendant. A bill of exceptions was taken to the admission of certain testimony on the trial, and also to the refusal of the court to instruct the jury that the former conviction pleaded by the defendant is a bar to this indictment.

The first error assigned is the overruling of the demurrer to

the first replication. But no prejudice was caused to the defendant by this, inasmuch as the replication was afterwards withdrawn.

The second assignment is that the court erred in permitting the replication to be withdrawn, and a new one to be filed, after issue joined on the first. This was a matter within the discretion of the court, and its exercise does not appear to have worked any injury to the defendant, for it was attaining the same end that would have resulted if his demurrer to the replication had been sustained. And the rule in the courts in this country is to allow amendments of pleadings in cases of misdemeanor, though in England they were only allowed in cases of felony. Commonwealth v. Burge, 3 Penn., 262; Foster v. Commonwealth, 8 Watts & Serg., 77; 13 Mass., 456.

The third error assigned is that the court permitted the indictment to be amended by striking out certain descriptive words from it. This was expressly authorized by the statute. Rev. Code, 615, art. 262.

The next error assigned is the judgment of the court upon the plea of former conviction, in holding that the record of the conviction set forth in the plea was not a bar to a conviction under this indictment. This ground of error embraces also the ninth assignment, relating to the refusal of the instructions asked at the instance of the defendant, that the record of conviction pleaded was a bar to this indictment.

It is undoubtedly true that if the offense charged against a party in a second indictment *be identical* with an offense charged against the same party in a previous valid indictment, upon which he was tried and acquitted or convicted, that judgment will be a bar to the second indictment; and that it will be presumed that all the evidence that could be adduced in support of the former indictment was adduced on that trial. Rex v. Sheen, 2 Carr. & Payne, 634 (12 Eng. C. L. Rep., 776); 1 Russ. on Cr., 834 (7th Amer. from 3d Lond. edit., 1853). But in order to render a plea of former acquittal or former conviction successful, it is necessary for the defendant to show *the record of the former proceedings and conviction*, and, further, to prove *the identity of the offense*, and also *of the person* charged in the two

indictments. Archb. Crim. Pl., 4 Amer. edit., 85; 1 ib. by Waterman, 113, note. After proof of these things, the question is, whether the accused could have been convicted upon any state of evidence on the former indictment; for if he could, he must be acquitted on the second. 1 Russ. on Cr., *supra*.

The question, then, in this case is, does it appear by the record of the former conviction, set forth in the plea; for that was all the evidence offered in support of the plea that the offense of which the defendant was convicted on the former indictment is the same identical offense charged in this indictment. And it is very clear that the identity of the offense does not appear.

It is argued in behalf of the plaintiff in error that, inasmuch as the defendant might have been convicted by proper evidence under the former indictment, for selling spirituous liquor without license to John Hobart, he is entitled to the benefit of the presumption that *the conviction was for that offense*, and should have been acquitted on this indictment. But this proceeds upon a manifest perversion of the rule above stated, in relation to the presumption of law applicable to the former conviction. That rule applies only when the identity of the offense has been sufficiently established by evidence to be adduced by the defense; and in offenses which, in their nature, are capable of repetition, and each repetition of which is a substantive violation of law, there is no legal presumption of identity. Thus, if the former indictment had charged a selling to John Hobart, and the defendant had been convicted upon that indictment, the record of the conviction would not, in presumption of law, have been a bar to the present indictment, because it would not necessarily appear that he was charged with the same identical offense in both indictments. It would have been incumbent on the defendant in such case, as it was incumbent on him in this, to prove by sufficient evidence, in addition to the record of the former conviction, that the offense of which he was there convicted was the same identical offense charged in this indictment; and if the plea had been one of former acquittal, and the record had showed it, and the identity of the offense with that for which he was tried under the former indictment had been established by sufficient evidence, then he could not be

convicted by any evidence upon this indictment, though such evidence was not adduced on the former trial, and might have been sufficient, if adduced, to convict. Hence, if it be conceded that the defendant might have been convicted upon proper evidence on the former indictment, for selling to John Hobart, it would by no means follow that the offense charged in this indictment must be the same identical offense of which he was then convicted; for he might have unlawfully sold spirituous liquors to John Hobart at divers times; and if so, upon the reasoning in behalf of the plaintiiff in error, a conviction for one of the offenses would, by the mere legal operation of the record of conviction, be a bar to an indictment for any other of them, without any proof of the identity of the offense. It is therefore manifest that there is no legal presumption of identity arising from the record of conviction, and that it was incumbent on the defendant to prove the identity by sufficient legal evidence, in addition to the record of conviction, in order to make his plea successful. 1 Archb. Cr. Pl. by Waterman, 113, note 1, quoting 2 Russell on Cr.; State v. Cassity, 1 Richardson, 91; State v. Ainsworth, 11 Vermont, 91.

We think, therefore, that the judgment upon the plea, and the action of the court in overruling the defendant's instructions in relation to it, were correct.

The last ground of error relied on is, that the court allowed the witness Wren—who was a member of the grand jury which found the indictment—to testify on the trial.

The first question propounded to this witness to which objection was made was, whether he was one of the grand jury at the time at which both of the indictments against the defendant were found. It is not perceived that any prejudice could be done to the defendant by an answer to this question, whether in the affirmative or negative. The witness was also asked, on the part of the state, whether the indictment against the defendant for selling spirituous liquors to John Smith and others was found, and whether John Hobart was before the grand jury before the indictment in the last mentioned case was found. To these questions the defendant objected, on the ground that what transpired in the grand jury room is not evidence.

Whatever may have been the rule in relation to the competency of these questions before the passage of the present code, they are rendered competent by the provisions then made upon the subject. Rev. Code, 614, art. 252.

Let the judgment be affirmed.

McGuire v. State, 37 Miss. R., 369.

Retailing.

The circuit court has the right to set aside a juror, without challenge from either party.

After a juror has been sworn and has taken his seat, if it be discovered that he is incompetent to serve, the court, in the exercise of a sound discretion, may set him aside at any time before evidence is given.

That there is a reasonable ground to suspect that a juror will act under some undue influence or prejudice, is sufficient to authorize the court, in the exercise of a sound discretion, to set him aside.

The fact that a juror stood indicted and untried for the same kind of offense as that for which he was called upon to try another person, is sufficient ground for setting him aside.

Where no objection appears to have been made to a juror sworn in the place of one set aside, it will be presumed that the case was tried by an impartial jury.

In prosecutions for retailing, a druggist selling spirituous liquor in the quantities and within the limits prohibited by the statute, cannot justify himself by the mere representations of the purchaser, that the liquor was for medicinal purposes. Haynie v. State, 32 Miss., 400.

The refusal of the circuit court to grant instructions containing mere abstract propositions of law, cannot be assigned as error.

Error to La Fayette circuit court. Thompson, J.

M. J. McGuire was indicted in the court below for selling vinous and spirituous liquors in less quantities that five gallons, within five miles of the University of Mississippi, under the Act of 28th February, 1848, Rev. Code, 156, § 4. The first section of this act prohibits the sale of vinous and spirituous liquors in less quantities than five gallons, within five miles of the university, and contains the following proviso: "Provided, however, nothing herein shall be construed to prohibit the sale of vinous and spirituous liquors in less quantities than five gallons from drug-stores, for medicinal purposes.

After the jury was empaneled and sworn, the district attorney objected to one Isaac Addington, one of the jury, for cause,

and assigned for cause that there was pending in the court, at that time, several bills of indictment against him for retailing. The court sustained the objection, and set the juror aside, and a *tales* juror sworn in his place; to which the defendant excepted.

The defendant asked the following charges, which were refused by the court, to wit:

1. If a party buys liquor from a druggist in less quantities than five gallons, within five miles of the University of Mississippi, for a beverage; but if he, at the time he so bought it, represented to the druggist that he wanted it for medicinal purposes, and if the jury believe that the party purchasing it was such a person, and bought the liquor under such circumstances as that a prudent druggist might have been deceived, and that the druggist was deceived by the purchaser, and believed he wanted it for medicinal purposes, such sale by a druggist is not a violation of the law.

2. If the jury believe, from the evidence, that the defendant sold the liquor to the witness in good faith for medicinal purposes, then he is not guilty, although the jury may believe that the witness imposed upon the defendant as to the object for which the liquor was in fact bought.

3. The defendant is not responsible for what the witness did with the liquor after he obtained it, if at the time the defendant did not know that the witness wanted it for any other than medicinal purposes.

4. If the jury have a reasonable doubt as to the guilt of the defendant, they will give the defendant the benefit of such doubt.

5. The defendant is entitled to the benefit of all reasonable doubts arising out of the testimony in the case.

The defendant was convicted, and on his motion for a new trial being overruled, he excepted, and sued out this writ of error.

H. A. Barr, for the plaintiff in error.

1. A juror cannot be challenged for cause, or set aside, after the entire jury has been elected, empaneled and sworn. 1

Archb. Cr. Pr. & Pl., 163; 2 Hawks' P. C., 568; 1 Chitty's Cr. Law, 545; Wharton Am. Cr. Law, 971; 1 Coke Inst., bk. 3, ch. 9; McClure v. State, 1 Yerger, 206; Regina v. Frost, 9 C. & P., 137; Commonwealth v. Knapp, 10 Pick., 477; Bratton v. Bryan, 1 Marsh., 212; King v. State, 5 How., 730; State v. Flower, 1 Walk., 318; Commonwealth v. Jones, 1 Leigh, 598; Beauchamp v. State, 6 Blackf., 299; Hooker v. State, 4 Ohio, 348; Manley v. State, 7 Blackf., 593; Morris v. State, ib., 607; Williams v. State, 3 Kelly, 453; 4 Black. Com., 283.

2. The fact that a juror stands indicted for a similar offense, never has been held to be sufficient cause of challenge. Wharton Am. Cr. Law, 967, 968. It was error to set aside the juror for insufficient cause. Boles v. State, 1 S. & M., 400, 401; 24 Miss. R., 452; Ogle v. State, 33 Miss. R., 388 (dissenting opinions); Cotton v. State, 31 Miss. R., 509, per Fisher, J.

3. The court below erred in refusing the fourth and fifth instructions to the jury. The ground upon which the court refused these instructions was, that they did not apply to misdemeanors. In the case of the State v. Turner, Wright's Ohio Reports, it was held that the rule of law in relation to doubts applies only in capital cases, and not to misdemeanors. But Wharton, citing this case, says: "It cannot be doubted, that in making such distinction, the learned judge was in error. Doubts as to a defendant's guilt are to weigh in his favor, because the law presumes him innocent until he is shown to be guilty; and if such presumption exists at all, it exists in every case alike." Wharton Am. Cr. Law, 330.

"In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt." 1 Starkie Ev., 451; 3 Greenl. Ev., §§ 30, 31.

"The jury, in civil cases, must decide upon the mere preponderance of evidence; whereas, in order to a criminal conviction, they must be satisfied of the party's guilt beyond any reasonable doubt. 1 Greenl. Ev., 537; 3 ib., 29. The jury are to be

morally certain of the guilt of the prisoner, to the exclusion of every doubt. Burrill on Cir. Ev., 198. It is an established maxim in criminal cases, that the jury are not to weigh the evidence, but in cases of doubt acquit the prisoner. Roscoe's Cr. Ev., 14. Every one is presumed to be innocent until the contrary is proved; and if there is reasonable doubt of his guilt, he is to have the benefit of such doubt. 1 Archbold Cr. Pr. & Pl., Waterman's notes, 118; see also, Cicely v. State, 13 S. & M., 211.

The rules applicable to crimes must be applied to misdemeanors, for they are synonymous terms. 4 Black. Com., 5; 3 Greenl. Ev., § 1.

4. The doctrine of the intent with which an offense is committed, is one of the foundation principles of public justice. There is only one criterion by which the guilt of men is to be tested, and that is, whether the mind is criminal. The act itself does not make the man guilty, unless his intention were so. 1 Bishop's Cr. Law, 226, 227.

5. The error committed by the court below in refusing to give the instructions asked by defendant, should reverse the case. If the jury had been permitted to consider the facts of the case, in the light of the instructions asked by the defendant, it is probable that the verdict would have been different. At least, it cannot be said that the verdict would have been the same, if the jury had been permitted to consider the intention of the defendant, and to give him the benefit of a reasonable doubt of his guilt.

T. J. Wharton, attorney general.

1. "After a juror has been sworn in chief and taken his seat, if it be discovered that he is incompetent to serve, he may, in the exercise of a sound discretion, be set aside by the court, at any time before evidence is given; and this may be done even in a capital case, and as well for cause existing before as after the juror was sworn. Wharton Am. Cr. Law, 860; Toel v. State, 11 Leigh, 714; People v. Damon, 13 Wend., 352. The court may and should, in its discretion, set aside all persons who are incompetent jurors; and it may be done after he is

approved, without objection to him by the state or accused. 9 S. & M., 115; 2 Mason, 91–94, 104; 6 Humph., 249; 8 ib., 597; 2 Dev. & Bat. 196.

2. The refusal of the court to give the fourth and fifth instructions for the defendant, I am free to admit, without consenting to a reversal, that I have found but one case sustaining the action of the court. State v. Turner, Wright (Ohio) R., 29, where a distinction is made between crimes and misdemeanors on the subject of doubt in the minds of the jury. In that case, referring to the giving of reasonable doubts to the accused, the court say: "But this is a rule of law adopted in favor of life, and is, therefore, in this case, only applicable to the charge of murder in the first degree. It does not apply to either of the other offenses embraced in the indictment. It is impracticable to attain absolute certainty in human affairs, * * * although the rule of law on the subject of doubts does not apply to crimes not punishable with death," &c.

3. The verdict of the jury is fully supported by the evidence, and I leave it for the court to say whether the ruling was proper on the above points, and if not, whether the judgment shall be reversed, seeing that the same result would have occurred if the charges had been given.

Handy, J.:

The plaintiff in error was indicted and convicted for unlawfully selling spirituous liquors in less quantity than five gallons, within five miles of the University of Mississippi.

Several bills of exception were taken in the court below, which present the grounds of error here assigned.

The first ground of exception was, that after the jury had been empaneled and sworn, the district attorney objected to one Addington, who had been sworn on the panel, sitting as a juror in the case, because there were then pending in that court several indictments against him for retailing spirituous liquors; and the court sustained the objection, and set aside the juror, and caused another person to be summoned and sworn in his place.

It is held by this court that the court below has the power to

set aside a juror without challenge by either party. Lewis v. The State, 9 S. & M., 115. This is upon the ground that it is the duty of the court to see that an impartial jury is empaneled, composed of men above all exception. Upon the same principle, it is laid down that after a juror has been sworn and taken his seat, if it be discovered that he is incompetent to serve, the court, in the exercise of a sound discretion, may set him aside, and at any time before evidence is given. Wharton's Amer. Crim. Law, 860 (2d edit.); People v. Damon, 13 Wend., 351; Tocel v. Commonwealth, 11 Leigh, 714; Williams v. The State, 32 Miss., 389.

As to the sufficiency of the objection to the juror, that is a matter which should rest, for the most part, in the sound discretion of the court, especially in cases of misdemeanor. It has been held to be a sufficient objection to the competency of a juror, that there are reasonable grounds to suspect that he will act under some undue influence or prejudice. Whart. Cr. L., 858. The fact that a juror stood indicted and untried for the same kind of offense as that upon which he was called upon to try another person, would most naturally create a bias in his mind, and a disinclination to finding a verdict against the accused. For the verdict would, in a greater or less degree, have the effect of a precedent, either for or against a conviction in similar cases, and the situation of such a juror appears to come fully within the principle which requires a juror's mind to be free from all bias and prejudice, and especially such as has relation to his own interest.

It does not appear that there was any objection to the competency of the juror sworn in the place of the one who was set aside, so that it must be taken that the case was tried by a fair and impartial jury. We think that this ground of error is untenable.

The next error assigned applies to the instructions asked in behalf of the accused and refused by the court.

The second instruction is as follows: "If the jury believe, from the testimony, that the defendant sold the liquor to witness in good faith, for medicinal purposes, believing, at the time, that witness wanted the liquor for medicinal purposes,

then he is not guilty, although the jury may further believe, that the witness imposed upon defendant as to the object for which the liquor was in fact purchased." And the first instruction is substantially to the same effect, and the same idea is conveyed in the third.

The evidence in relation to the sale consisted of the testimony of James F. Dunlap, who testified that he had obtained spirituous liquor in quantities, never more than a quart at a time, as many as twelve times; that sometimes he wanted it for medicinal purposes, and sometimes not; that once he got it from the defendant, when witness was intoxicated, but was not certain whether defendant knew he was intoxicated or not, but thinks he could have known it, because other persons could tell when he was intoxicated. That defendant always asked him if he wanted the liquor for medicinal purposes before he got it, and sometimes he told him it was for that purpose, and sometimes he answered, "*Of course.*" That he did not tell him directly and positively that it was for medicinal purposes when it was not, but that he always replied to defendant's question whether it was for medicinal purposes, "*Of course,*" in an emphatic way. That witness was a married man and had a family; that defendant was a druggist at Oxford, within five miles of the University of Mississippi.

It has been settled by this court that, in prosecutions under the statute upon which this indictment is founded, a druggist selling spirituous liquor in the quantities and within the limits prohibited by the statute, cannot justify himself by the mere representations of the purchaser that the liquor was purchased for medicinal purposes, but that it devolves upon him to prove that it was purchased for that purpose. Haynie v. The State, 32 Miss., 400.

It is clear, from the evidence, that some of the liquor in this case was purchased for other than medicinal purposes; and hence the instructions, which rely as a justification upon the belief of the defendant, founded on the statements of the purchaser, that the liquor was for medicinal purposes, were properly refused. But, in addition to this, it is quite apparent from the testimony that these representations of the purchaser were

mere matters of form; and the manner in which they were made clearly showed that they were understood not to show the real purpose of the purchase, and that the defendant could not have been deceived as to its real purpose. This is manifest from the fact that the sales were sometimes made to the party when intoxicated.

These instructions were, therefore, properly refused.

The fourth and fifth instructions state the general rule, that if the jury had a reasonable doubt of the defendant's guilt, they should acquit.

This, as a general rule of law, is unquestionably correct; and the instructions should have been given. But yet, the refusal of them is not necessarily error. As abstract propositions, it is true, they are correct. But did the refusal to give them, prejudice the defendant? It clearly could not have had that effect; for, upon the evidence, there was no such state of doubt as could be resolved in his favor. The sale was fully proved, and there was an entire failure to show that it was made under the circumstances of justification stated in the case above cited. If the instructions had been given, there was not a state of case made to which they could have had any proper application; and they could not, therefore, have benefited the defendant. Hence the refusal of them is no ground of reversal.

The instructions granted at the instance of the state are erroneous, for the same reason as those asked in behalf of the defendant; in holding that the representations of the purchaser, in order to justify the sale, must have been such as to satisfy a reasonable man that the liquor was purchased in good faith for medicinal purposes. But this error was favorable to the defendant, and he cannot complain of it.

Upon consideration of the evidence, it is clear that the judgment is correct, and that the technical errors committed could not, in law, have operated to the prejudice of the defendant. The judgment is, therefore, affirmed.

WHITTON ET AL. v. STATE, 37 Miss. R., 379.

RETAILING LIQUORS, &c.

As a general rule, a partner is not liable for the criminal acts of his associate, done without his knowledge or consent; but by the express provision of the Rev. Code, 199, art. 9, this rule is changed in relation to sales of vinous and spirituous liquors by licensed retailers to an intoxicated person; and under that article, one partner may be indicted and convicted for a sale of such liquor to an intoxicated person by his associate, though he was not present.

It is not necessary to a conviction under an indictment for a violation of the statute prohibiting the sale of vinous and spirituous liquors to a person intoxicated at the time of the sale, that the seller should actually believe that the purchaser was intoxicated; it is sufficient if it be shown that the buyer was actually intoxicated, and that the seller had good reason to believe that he was in that condition.

Ignorance of the law is no excuse for crime; and for this reason it is not error to refuse to instruct the jury, "That where a party is indicted for the violation of a penal statute, it is necessary to a conviction that such party did knowingly and wilfully violate the statute.

Error to Marshall circuit court. THOMPSON, J.

Featherston, *Harris*, and *Watson*, for plaintiff in error,

Cited, Bishop Cr. Law, 224–254; 10 Johns., 443; 2 Taylor Ev., 93.

T. J. Wharton, attorney general,

Cited, 1 Greenl. Ev., 111, 112; Rex v. Almin, 1 Leading Cr. Cases, 241; Rev. Code, 199, art. 9.

J. R. Chalmers, on same side,

Cited, Rex v. Meddle, 6 Carr. & Payne, 292; Rex v. Gutch, M. & M., 433; 1 Leading Cr. Cases, 247.

HANDY, J.:

The plaintiffs in error were indicted and convicted of selling spirituous liquor to one Greer, who was then intoxicated, they having general license to retail spirituous liquors.

It was proved by Hewett, the only witness on the part of the state, that on one occasion he saw Greer in the town where the spirituous liquor was charged to have been sold; that he knew when Greer was drunk, and considered him so at the time referred to, because he rode his horse up and down the street several times, and made more noise than usual; that he saw him go into the grocery of the defendants on that day and call for a glass of spirituous liquor, which was given to him by the de-

fendant, Whitton, and drunk by Greer, who threw down some money on the counter for it. Witness did not know whether Whitton knew that he was drunk, but thought he ought to have known it; he thought that Greer staggered some when he walked, but got on and off his horse without difficulty. On the part of the defendants, Wright testified that he lived in the town, and did business immediately in front of defendant's grocery, and was frequently there, and saw Greer in the town, and intoxicated, about the time mentioned by Hewett, and heard him call for liquor on that day, and tell Whitton he had no money; to which Whitton replied that he could not get it without the money, and that he saw Whitton sell him no liquor on that day. Both of these witnesses proved that Ford was not present on the occasion referred to; that he lived some distance from the town, and was seldom there, and, so far as they knew, he had no knowledge of this sale.

The first error assigned is to the following instruction, given at the instance of the state: "If the jury believe, from the testimony, that the defendants sold spirituous liquor to Greer, who was then intoxicated, then they will find them guilty as charged; and that it is immaterial whether both the defendants sold the liquor or not, provided both had an interest in the liquor sold."

It is insisted that this instruction was erroneous, because a partner is not liable criminally for the criminal acts of his copartner or his agents employed to do his legal business.

This is true as a general rule of law, and if the instruction was supported alone by general principles, the objection to it would prevail. But the statute in relation to the subject establishes a new rule of evidence, affecting the responsibility of parties so situated. It prohibits, among other things, the sale of any vinous or spirituous liquors by any person having license to retail the same to any person then being intoxicated, and provides that "the person so offending (and also any person who may own, or have any interest in, any vinous or spirituous liquors sold contrary to this act), shall be liable to indictment," &c. Rev. Code, 199, art. 9.

It is admitted that Ford was a partner in the grocery, and interested in the liquor charged to have been sold; the rule, then,

declared by the statute, renders him responsible for the illegal act of his co-partner, done in the course of the partnership business, whether he participated in the act or not, and the instruction is sanctioned by the statute. But it may be said, that to give the statute such a construction would be contrary to the principles of natural justice, and oppressive. This view might be taken with better reason, and, in order to ascertain the true construction of the statute, if there was any room for doubt upon it. But the terms of the statute are plain and explicit, and there is no room for construction upon the point raised by the objection under consideration. Its object is as plain as its terms are clear. It was intended to reach a grievous evil in the community, by which persons of more or less responsibility, engaged worthless and profligate persons in the business of retailing spirituous liquors for the profit of their employers, in violation of the laws of the land, resorting to all sorts of pretences, artifices, and frauds to conceal the violations of law, or the guilty participation of the principals in it. The evil required a stringent process to reach it, and the legislature designed by this statute in some degree to meet and prevent it. Persons who, by their means, set up and enable others to engage in a business which, in its very nature, is almost inseparable from violations of law, have no right to complain that the tribunals of justice are clothed with adequate powers to drag them from their concealment, and to visit upon them some slight degree of punishment for the misery and crime which they have been instrumental in inflicting upon the community within the range of their influence.

The next objection is taken to the second instruction in behalf of the state, which merely states the proposition that if a man commits an act in violation of law, he is liable to the penalties of the law, whether he knew of the law or not, as every man is bound to know the law. This is undoubtedly correct.

The third error assigned is the refusal of the court to give the first instruction asked in behalf of the defendants, which is as follows: "That where a party is charged with a violation of a penal statute, the jury must believe from the testimony, in order

to a conviction, that such party did knowingly and wilfully violate the statute."

This instruction was properly refused, for the same reason just stated. It holds the idea that a party must wilfully intend to violate a statute in order to be liable to the penalty established by it. But as he is bound to know the law, he is held to the consequences of a wilful violation of it, whether he knew of its existence or not. Otherwise, it would be difficult to punish any man for a violation of law, because it might be impossible to prove that he had knowledge of the law. Hence the legal presumption that every man knows the law, and that his violations of it are wilful.

The next error assigned is the refusal to grant the second instruction asked by the defendants, in these words: "That unless the defendants knew, or had good reason to believe, and did believe, that Greer was drunk at the time of the sale, they must acquit, which fact is to be determined by the jury from the evidence."

It was certainly necessary that the defendants should either have known, or had good reason to believe, that the person to whom the liquor was sold was intoxicated at the time of the sale; and if the rule had been thus stated, it should have been given. But the instruction required that the defendants should either know that he was intoxicated at the time, or have good reason to believe, *and believe it*, in order to be liable. If they had good reason to believe that he was intoxicated, and he was in fact intoxicated at the time, the defendants were responsible for the sale; for the good reason to believe that he was intoxicated was a sufficient warning to them not to sell to him; and in law they are chargeable with notice of that which they had good reason to believe, if the fact was as the appearances indicated. It might be impossible to prove what they actually believed; but they were bound to act upon the assumption that what they had good reason to believe was true.

This instruction was, therefore, properly refused.

The last error assigned is that the verdict was contrary to the evidence. In support of this assignment, it is said that the testimony does not sufficiently show that the liquor was sold to

Greer, or that he was intoxicated at the time. We do not agree with this view. Both of these facts are sufficiently proved by the witness for the state, to warrant the jury in considering them established.

The judgment must be affirmed.

NEWCOMB *v.* STATE, 37 Miss. R., 383.

HOMICIDE.

Art. 7, p. 573, of the Rev. Code, which provides that all objections either to the form or substance of an indictment shall be made before verdict, applies to those cases only where the defect is of such character that the accused may waive it, either expressly or by his silence.

The right secured to the accused by the 10th section of article 1 of the constitution of this state, "to demand the nature and cause of the accusation against him," cannot be waived or surrendered by him; and hence, if the indictment do not contain such a description of the offense as to give him the nature and cause of the accusation against him, it is a nullity, and may be objected to at any time.

The means and manner of the commission of the crime of murder are not necessarily embraced in a description of the "nature and cause of the accusation," in the sense of the constitution of this state; and hence article 256, p. 616, of the Rev. Code (which provides that "in an indictment for homicide, it will not be necessary to set forth the manner in which, or the means by which, the death of the accused was caused; but it shall be sufficient to charge in an indictment for murder that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased"), is not in conflict with the 10th section of the bill of rights, and an indictment framed under it is valid.

In order to render declarations competent evidence in favor of the declarant, on the ground that they are part of the *res gestæ*, it is essential that they should have been made contemporaneously with the main fact which they are offered to illustrate, and whilst the transaction they are supposed to explain was being carried on; and hence the declarations of a party accused of murder, made just before the killing, and while the deceased was absent, and when the accused did not suspect that a conflict with the deceased was impending, is inadmissible in his favor.

Where it does not appear from the evidence that the deceased made any hostile demonstration against the accused at the time of the killing, nor even that the threats which he had previously made against the accused were known to the accused, the latter has no reason to believe that the feelings of hostility which caused the deceased to assault and beat him on a previous occasion still continued, or that there was danger of a deadly assault upon him by the deceased at the time of the killing.

If a witness answer in the affirmative a question whether he has not made statements or done acts in relation to the matter involved in the issue, going to show a strong feeling or bias on his part, touching the main fact which gave rise to the trial, and in justification or condemnation of the party on trial, that fact would be proper to be weighed by the jury in considering the weight to be given to his testimony.

It is competent to contradict the testimony of a witness, who, upon his examination, has denied that he had used expressions or done acts, in relation to the matter involved in the issue, showing that he is under a bias or undue influence against the opposite party involved in the transaction which forms the subject-matter of the issue.

Anything legitimately tending to show that a witness is under undue influence or bias

for or against a party to an issue in which he testifies, may be shown to a jury, to enable them to graduate the true value of his testimony; as, the near relation of the witness to the accused.

A party introducing a witness has no right to object to the propounding of a question to the witness, the answer to which might tend to criminate him. It is in the power of the witness to object, and if he does not object, the question and answer, if not otherwise objectionable, are competent.

If a witness declines to answer a question on the ground that the answer might criminate him, no inference prejudicial to his credit can be drawn from his refusal, and courts should be careful so to inform the jury.

If it be established by the legal evidence that the accused committed a criminal offense, it will be presumed that it was done by a sound mind; and that presumption is not overcome by the probability that the accused is insane. In order to establish a defense on the plea of insanity, it must be clearly proved.

The jury are the judges of the evidence. Therefore it is no ground of reversal that the jury did not give credit to certain witnesses.

A new trial will not be granted to allow a party to introduce new evidence, which is merely cumulative, and which it does not appear was unknown to him before, and could not have been procured by him at the trial.

The courts may disregard the statements made in *ex parte* affidavits read in support of a motion for a new trial, where such statements are highly improbable, and inconsistent with the state of facts appearing on the trial.

A special *venire* is no part of the record in a criminal case, and cannot be made so unless it is embodied in the bill of exceptions.

Error to Tishomingo circuit court. ACKER, J.

Tyra G. Newcomb was indicted in the court below for the murder of John Frieze. The indictment charges "that Tyra G. Newcomb, late of said county, laborer, on the 16th day of July, in the year of our Lord one thousand eight hundred and fifty-eight, in the county of Tishomingo aforesaid, did feloniously, wilfully, and of his malice aforethought, kill and murder John Frieze, against the form of the statute in such cases made and provided, and against the peace and dignity of the state of Mississippi."

The defendant was arraigned, and plead not guilty.

William Freize, a brother of deceased, testified that the deceased was shot by the prisoner, and died on the 11th day of July, 1858, in Tishomingo county; that in the forenoon of that day, deceased and witness were engaged in cutting timber on a ridge in the woods, and while thus engaged, the prisoner came to them from a hollow, where witness had heard a gun fired. The prisoner had a rifle and a squirrel, which he had shot; and when he first came up and inquired of witness if he had seen certain hogs, which he described, and said he was hunting for them, witness replied that he had not seen the hogs, and then he and the prisoner conversed a little about the hot weather for

cutting stocks, and other matters. After a short time, witness told the prisoner he had seen hogs in the bottom near by, and suggested that probably they might be the hogs prisoner was looking for. The prisoner then asked where they got water to drink, and witness informed him where the spring was. Defendant then went into the bottom and called the hogs; and soon afterwards, without going to the spring, he returned and said the hogs were not his. Witness and the prisoner talked together again, and the prisoner remained with them some time. While he was there, it happened that witness and the deceased were both cutting on the same log with their backs turned to the prisoner; and the witness, turning his head, saw the prisoner make two steps towards a small tree, and he appeared to see that witness was looking at him, and "grunted out something" which witness did not understand. Soon afterwards the prisoner inquired after the wagon, engaged in hauling stocks, and left, passing over the ridge. Witness and deceased continued cutting timber until dinner time, when witness started over the ridge to tell the negroes cutting timber that it was dinner time, and the deceased started in the direction of the mill, agreeing to wait in the road until witness should overtake him. When witness got in sight of the road, he saw the wagon and team, under the charge of David Brown, standing in the road, and headed towards the mill. The wagon was loaded with three logs, two at the bottom, and one on the top of these. The deceased was sitting on the top log, and was facing to the left side of the wagon. Brown was sitting down just in front of the deceased, and so near to him, that upon rising he could have put his hands upon him. The defendant was sitting to the right of Brown, and nearest to the rear of the wagon, and a negro was sitting still farther to the right, and in the rear of Brown and the prisoner. Witness continued to approach, and heard the firing of a gun, and saw the smoke rise from the prisoner's gun. The deceased put his right hand to his left breast, and said, "Lord of mercy!" Brown then rose up and put his hand to the deceased to support him. "At the firing of the gun witness saw the prisoner rising up and running off from the place, and after running some ten steps he stopped, turned, and seemed to

be looking the deceased in the face; and at that instant the deceased bowed his head, and the prisoner ran on.

Brown then halloed to witness to come on, and witness ran in the direction of the wagon, which brought him to crossing the line of the defendant's flight, and they approached near together. The prisoner drew a pistol and said to witness, "If you come here, I will serve you in the same way." This occurred about fifty yards from the wagon. Witness then ran to the wagon, and the accused ran off, taking the road which leads to his father's house. Witness assisted Brown in taking deceased from the wagon, and immediately after this the deceased died. The bullet entered the body of the deceased an inch or two above the left nipple, and ranged to the right side of the back part of the neck, where the shoulders join.

On cross-examination, witness stated that while the prisoner was with him that morning in the woods, he appeared perfectly friendly and agreeable, and conversed as usual, in a friendly manner. Nothing unusual occurred which at the time attracted the attention of witness. Witness and the prisoner were perfectly friendly. Witness could not say whether the step or two taken by the prisoner was for the purpose of getting into the shade or not, and it did not excite his attention "immediately at the time." No words were exchanged by the accused and the deceased in the morning. The prisoner could have shot the deceased while they were cutting stocks, if he had desired to have done so. Witness did not hear Brown tell the prisoner after the shooting to stop, nor ask him what he had been doing there. Witness was more than fifty yards from the wagon when deceased said, "Lord of mercy."

About fifty yards from where the wagon stood, and in front of it, the road intersected with another leading from prisoner's father's house. These roads approached each other so as to form an acute angle; and so that a point on the Newcomb road, fifty yards from the intersection, would not be over fifty yards from the place where the wagon stood. This road was on the left of the wagon. The shooting took place about one quarter of a mile from Newcomb's house. Witness did not probe the wound, nor see it probed; thought it ranged as he

had stated, because he saw that blood had settled on the back of the neck, where the right shoulder joins it. The ball did not pass out of the body.

David Brown, for the state, testified that a short time before the killing, the prisoner, having a rifle and a squirrel, came to where witness was loading stocks on his wagon; he set his gun down and assisted witness in loading. After the stocks were loaded, witness sat down on the left of the wagon, and facing it. The prisoner picked up his gun and sat down a few steps to the right of witness, and also facing the wagon; and a negro sat down still farther to the right, and more in the rear. In a short time the deceased came up, and said he wanted to ride; and by permission of witness, he got up on the wagon. The position of deceased on the wagon was described by Brown, as witness Freize had testified. Deceased then had some conversation with the negro about the negroes whipping his teams, and then the deceased turned his face fully to the team and whistled, for the purpose of starting it. The two front pair of oxen had started, but the others were still standing; and the witness was just in the act of rising up to tell the prisoner good-bye, when he saw the prisoner with his rifle bearing on the deceased, the breach of it being on his breast or near his shoulder, and he immediately fired. The deceased put his hand to his breast, and said, "Lord of mercy!" The blood gushed from his mouth and nose, and he was about to fall, when witness caught hold of him. When the gun fired, the prisoner ran off in the direction that William Frieze was coming, who was then approaching the wagon. Witness and the negro and William Frieze then assisted deceased from the wagon, when he immediately expired. Witness and the prisoner were engaged in a conversation about cutting stocks, when the deceased came up.

Cross-examined.—Witness stated that he and the prisoner were perfectly friendly, and they talked together in a perfectly friendly manner. After the gun fired, witness "called to William Frieze to catch or arrest the prisoner, for he had shot deceased." Frieze ran towards the prisoner in the Newcomb road, and told him to stop, and asked him "what he had been doing there." Prisoner then drew a pistol, and said,

"If you don't let me alone," or "mind your own business, I will serve you in the same way." This occurred some fifty yards from the wagon. Deceased spoke the words, "Lord of mercy," before referred to, in a very low tone of voice.

The prisoner's counsel then asked the witness to state what was said by the prisoner about the deceased while they were at the wagon, and before deceased came up; and the answer thereto was excluded from the jury, as stated in the opinion of the court.

The witness, on being asked if he had not told Daniel Carpenter on the day of the killing, "that he did not see the gun of the prisoner fired," denied having made such a statement.

Daniel Carpenter, for the state, testified that on the day of the killing, the witness Brown stated to him and others assembled at the place where it happened, in answer to the question, "How it was done," that he was just picking up his whip, with his back to the defendant, as the gun fired.

Mrs. Newcomb, the mother of the prisoner, testified that on the morning of the killing the prisoner left home for the purpose of hunting his hogs. After early dinner, the witness started to go to a neighbor's house; and as she approached a road leading to the mill, she heard loud talking, as if some persons were quarreling; "but still, she thought she would go on;" and having advanced a short distance further, she recognized the prisoner's voice. She was then alarmed no longer, and walked on to within a short distance of the point of intersection of the two roads, and stopped by a log in an open space, where she could see and hear distinctly what passed. The witness described the location of the wagon, and Brown, prisoner, and negro, in the same manner as Brown did. She stated further that the parties were not quarreling, "talking something about cutting stocks, or that had occurred at the mill—the matter not distinctly recollected." Witness supposed she was about twenty paces from the parties. Presently the deceased came up the road from the rear of the wagon, and went on the opposite side of it from where Brown and the prisoner were sitting, and said he wanted to ride. Brown told

him to get on the wagon, which he did; and shortly afterwards he turned to the prisoner and said, "Tyra, what did you intend to make of me at court?" The prisoner replied, "Shut your mouth, John Frieze; I didn't come here to have a fuss with you, and I don't want one." Deceased turned to the prisoner and said, "Whether you want one or not, you shall have one, and that is not all;" and as he spoke, he put his right hand to his pantaloon's pocket, and looked like springing towards the prisoner. Brown rose up and said, "Now is your time;" and the witness, thinking there would be a fuss, started to go back to the house for her husband; and when she had gone a few paces, she heard a gun or pistol fire, and she then ran home to get her husband to come there. She found her husband in the field, and told him what had occurred; and he said Tyra was killed. When she and her husband got to the house from the field, they found the prisoner's gun loaded. They then concluded he was not killed. They then started to the scene of the shooting, and met Turner Pinkston, who informed them that the prisoner had killed John Frieze. They asked how he did it; and she said to Pinkston, "If he had done it, she didn't blame him; she would have done it too."

Cross-examined.—Witness told but one person (J. McCullough) besides her husband, what she had seen, until she told prisoner's counsel, after the last March term of the court. She was present when the prisoner was tried before the justice of the peace, in August, 1858. She had not communicated what she knew because she did not know that a mother could be a witness for her son. She had talked with two female acquaintances in reference to her right to testify for her son. As soon as she learned from prisoner's counsel that she was a competent witness, she communicated her testimony to them. Witness did not turn her head or look back when she heard the gun fire. She was then asked in relation to a statement made at the wheat harvest of 1858, to J. Lambert, as stated in the opinion of the court.

She also testified that the wound on the defendant's head, occasioned by the assault made on him by the deceased at the

mill, affected his health so much that he could not work. From the wound was discharged "much watery and bloody matter;" and that it had not cured up, but was still "running" at the time of the killing. Prisoner was much changed by the wound; in conversation he frequently wandered from the subject, and introduced new and strange ones.

The prisoner then introduced F. M. Hardwick, who testified that the deceased told him "he had not killed the prisoner, but he would if he ever crossed his path or fooled with him." Witness stated that he had never communicated this to the prisoner; and thereupon, on the motion of the district attorney, this testimony was excluded from the jury, and the prisoner excepted.

The prisoner then proved by ten witnesses, one of whom was J. Lambert, an uncle of the deceased, who were well acquainted with him and the deceased, that the character of the prisoner was good; that he was peaceable and industrious; and that the deceased was a turbulent, violent, and overbearing man. Several of the witnesses who were examined as to the condition of the prisoner's mind after the assault made on him at the mill by the deceased, and of these Dr. Carpenter, testified that after the said assault, and before the killing, the prisoner was frequently at witness' house, and he saw him also at other places; that in a conversation at witness' house, the prisoner abruptly changed the subject of conversation, and witness called his attention back to it again; shortly after, the prisoner again changed the conversation abruptly, and the witness a second time called him back to it. Prisoner then said "that before he received the *lick* from the deceased, he had a *misery* in the back part of his head; and since the *lick*, the *misery* from that in front had united with the *misery* behind, and made it very hard for him to control himself." At another time witness asked him "how his crop looked;" and he threw his head back and laughed, and said that "he had not made any." "He appeared different after the *lick* from what he was before, when he was uniformly an industrious, agreeable, and sensible young man."

L. Patrick testified, that before the assault by the deceased on the defendant, the latter was a sober, industrious, peaceable, and prudent young man; afterwards, he strolled about through

the woods, and was greatly changed from what he was before. This witness met the prisoner frequently after he was assaulted, and before the killing, and he usually had his gun; on one of these occasions the prisoner "flirted about his gun in such a strange manner as to alarm witness." The prisoner talked incoherently, leaving one subject and quickly passing to another.

John Little testified, that after prisoner was assaulted by the deceased, and before the killing, witness met the prisoner frequently; "there was a change in him; in conversation he was changeable, and would change from subject to subject frequently, and would repeat the same questions as if they had never been asked." His health was bad, and the wound inflicted by the deceased was not cured, but still "running" at the time of the killing.

J. Lambert was then introduced by the state, to contradict Mrs. Newcomb, in reference to her statements at the wheat harvest of 1858, who testified as stated in the opinion of the court.

At the instance of the state, the court instructed the jury on the subject of insanity, as follows:

6. That mere weakness of intellect, or imbecility of mind, does not excuse or exonerate a party from criminal punishment, if he had capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he was doing.

7. The law presumes every person, of the age of discretion, to be of sufficient capacity to form a criminal purpose; to deliberate and premeditate upon acts which malice, anger, hatred, revenge, or other evil disposition might impel to perpetrate; and to defeat this legal presumption, the mental alienation relied upon must be affirmatively established by positive or circumstantial evidence.

8. It is not sufficient to show that such a state of mind was probable, nor is it sufficient if the proof merely shows it to have been probable.

9. Partial insanity is not sufficient to excuse a party from criminal punishment, if he have reason and understanding

sufficient to enable him to distinguish between right and wrong in relation to the act.

10. Insanity, to amount to a complete bar of punishment, at the time of committing the offense, must have been of such a kind as entirely to deprive the prisoner of the use of reason, as applied to the act in question, and the knowledge that he was doing wrong in committing it.

The jury returned a verdict of guilty, and the defendant moved for a new trial, on the grounds that the action of the court on all the points to which he had taken exception during the progress of the trial, was erroneous, and also that the prisoner was really insane at the time of the trial; and in support of the motion, he read the affidavits of Dr. Walker and the jailor.

Dr. Walker's affidavit stated, that since the trial and conviction of the prisoner, he, assisted by two other physicians, had examined the prisoner, "and pronounced him to be partially, if not wholly imbecile, which is weakness and feebleness, and totally destitute of the power of reasoning."

The jailor's affidavit stated, that he had been in charge of the prisoner since January last; that when he first took charge of him the prisoner's health was bad, and has so continued most of the time since; that his health is now better; that during all this time the prisoner has exhibited an imbecility of mind, more that of a good-natured child than an adult; he has always been most obedient and docile, never complaining or making any objection to any arrangements made for him. On some occasions he has desired affiant to go into his room and play corns or buttons with him. At the last term of the court, when a quarter of a dollar was given him to buy cheese with, and for which article of food he had expressed a great desire, he said that the money was so pretty that he could not spend it, but that he would keep it; after a while he said it had become dirty, and that he had put it into his mouth to wash it off, and it accidentally passed down his throat. At two or more times, while affiant was assessing taxes, and had to be absent from home, the prisoner requested him to remain at home, stating that while he was absent he had heard persons

come into the room below and talk about chaining him, and also of whipping him, and that he could hear the clank of the chains. This was all untrue, as witness was informed by his family, who remained on the post when he was absent. The appearance of the prisoner was the same at these times as at all other times, but he must have been laboring under hallucinations of mind.

These things were not communicated to defendant's counsel until after the verdict, as affiant did not know what defense they would rely on. When affiant was taking the prisoner to jail, after the verdict was rendered, he manifested entire ignorance of its effect; and when he was informed on this subject, it did not, so far as affiant could discover, have any effect on him, he speaking of it with the same look of cheerfulness and composure which has been uniform with him since he was placed under affiant's charge. When he was told that he would be hung if the verdict was not set aside, his reply was, "that he supposed that it could not be helped," as composedly as if he was talking on any other subject, or the most indifferent subject. He was asked by the physicians who examined him, if he did fear punishment hereafter for killing Frieze, and he replied that he did not think he would be punished. Affiant's opinion was, "that the prisoner's mind was incapable of distinguishing right from wrong of itself, but that his ideas of right and wrong were altogether derived from others, or was traditional, and, as a matter of course, without the power to investigate for a conclusion for himself." Affiant could not observe that the trial, its progress or result, produced any effect at all on defendant's mind, feelings, appetite or temper, or, in a word, that it had any effect on him whatever. Affiant was firmly of the conviction that the prisoner was insensible of the consequences of the trial he had gone through, until he was told; or that his conviction was for the commission of a high offense against the laws, and that the penalty of the law was a just retribution therefor, as he was manifestly insensible of having committed any wrong, and he could not perceive the justice of the punishment pending, but in all that, will be as clay in the hands of the potter, so to speak, and will consent to

anything, or suffer anything, because he would be told to do so, and not because he had any just conception of its design, purpose, or effect.

The court overruled the motion for a new trial, and sentenced the prisoner to death; whereupon he filed his bill of exceptions, and brings his case to this court.

The special *venire facias* is copied into the record by the clerk, but is not contained in or referred to by any bill of exceptions.

B. N. Kinyon, for plaintiff in error.

1. The indictment is insufficient. It does not inform the accused of the nature and cause of the accusation against him. Archb. Cr. Pl., 38; Riggs v. State, 26 Miss., 51; Murphy v. State, 24 Miss., 590; Norris v. State, 33 ib., 373.

2. The exclusion of the question and answer of witness Brown was error. The testimony was part of the *res gestæ*, and should have been admitted. Mitchurn v. State, 11 Ga., 615; 5 ib., 132, 85; Wray, *ex parte*, 30 Miss., 675.

3. Proof of threats by the deceased should have been admitted, although they were not communicated to the accused. Granger's case, 5 Yerger, 459; Cotton v. State, 31 Miss., 504.

4. The question propounded on cross-examination to Mrs. Newcomb was improper. Roscoe's Cr. Ev., 153–169–170; 1 Greenl. Ev., 462.

5. The eighth instruction for the jury was clearly wrong. 1 Lead. Cr. Cases, 552; State v. Moole, 2 Ala., 49; Algheri v. State, 25 Miss., 584; Lambert's case, 23 ib., 322; Browning's case, 30 ib., 672.

T. J. Wharton, attorney general.

1. It is too late now to object to the indictment. Rev. Code, 573, art. 7.

2. The answer of witness Brown was properly excluded. It was not part of the *res gestæ*. Gardner v. People, 3 Scam., 90; 34 Miss., 275; 1 Greenl. Ev., § 108; 3 Conn., 250; 11 Georgia, 622; State v. Tilly, 1 Iredell's L. R., 435; Wharton's Amer. Cr. Law, 173; 6 Metc., 221.

3. The testimony in relation to the transaction at the mill, and the threats there made, was properly excluded. Price's case, 36 Miss., 531; 4 Iredell's Law, 409; 3 Stew. & Port., 316.

4. The action of the court in relation to the questions propounded to Mrs. Newcomb on cross-examination was correct. 1 Burr's trial, 244; 1 Greenl. Ev., § 451; 4 N. H., 562; 1 Mer., 400; 1 Greenl. Ev., §§ 456, 459; 1 Stark. Ev., 197.

5. As to pretence of insanity set up, *vide* Bovard's case, 30 Miss., 600; State v. Rogers, 7 Metc., 500; 3 Kelly, 310, 326, 330, 331, 332; 2 Greenl. Ev., §§ 372, 373.

6. The eighth charge given for the state is correct. The *onus* of proving insanity is on the prisoner. State v. Starke, 1 Strob., 479; Regina v. Taylor, 4 Cox's C. C., 155; 4 Cow., 207; 5 J. R., 144; 1 Curtis, 1; 1 Peters' C. C. R., 163; 1 Parker's C. C., 495, 649; State v. Spencer, 1 Zabriskie, 202.

HANDY, J.:

The plaintiff in error was indicted and convicted, in the court below, of the murder of John Frieze.

Exceptions were taken upon the trial to various rulings of the court against the accused; and after the verdict of conviction, a motion was made by him for a new trial, upon many grounds; which motion having been overruled, a bill of exceptions thereto was taken, and the case is brought here by writ of error.

Numerous errors were assigned, founded both upon the rulings in the court below, and upon other objections taken to the record. The questions thus raised we will proceed to consider.

The first error assigned is, that the indictment is insufficient in substance to support the conviction.

The indictment charges "that Tyra G. Newcomb, late of said county, laborer, on the 16th day of July, in the year of our Lord one thousand eight hundred and fifty-eight, in the county of Tishomingo aforesaid, did feloniously, wilfully, and of his malice aforethought, kill and murder John Frieze, against the form of the statute in such case made and provided, and against the peace and dignity of the state," &c. It is framed upon the

provisions of article 265 of the Revised Code, 616, that "in an indictment for homicide, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but that it shall be sufficient to charge, in an indictment for murder, that the defendant did feloniously, wilfully, and of malice aforethought, kill and murder the deceased.

It is not denied that the indictment is in conformity to these provisions, but it is insisted that the provisions are inconsistent with the 10th section of article 1 of the constitution of this state, which secures to a party accused by criminal prosecution the right "to demand the nature and cause of the accusation." It is, however, objected, in behalf of the state, that the alleged error cannot be considered here, inasmuch as no objection to the indictment was taken in the court below, and that the party is precluded from raising it here by the provisions of art. 7 of the Code, 573. If the error here assigned were upon matter of form, or even upon such matter of substance as the accused might waive, either expressly, or by failure to take advantage of it at the proper time and in the proper mode, in the court below, the objection to entertaining it here would prevail under the rule declared by the statute. But the error insisted upon goes to the very essence of the offense. It is that the indictment is invalid, because, in law, it charges no offense against the accused. If this position be correct, it is manifest that he could not waive the insufficiency of the indictment, by neglecting to raise any objection to it in the court below, so as to render a conviction rendered upon it valid; for that would be, by mere silence, to give legal validity to a criminal charge against him, when the indictment contained no such legal charge. On the contrary, the concluding clause of the article of the statute referred to plainly shows that it was deemed necessary that "the offense should be substantially described" in the indictment, and that a defect in that respect was not intended to be embraced in the provisions of the statute.

Is the statute, then, authorizing this indictment, in violation of the right of the accused to be informed of "the nature and cause" of the accusation against him? We think not. He is

charged in the indictment with *murder*, wilfully, feloniously, and of malice aforethought. This shows the "nature" of the accusation. The means by which the act was committed do not pertain to the "nature" of the accusation, nor are they properly the "cause" of the charge. When he is charged with *murdering John Frieze*, both the nature and cause of the accusation brought against him are made known to him sufficiently to enable him to know the particular offense with which he is charged, and to prepare to show his innocence, his excuse, or justification. The offense is particularized, so that if he should be acquitted, he will be enabled to plead the acquittal in bar of a subsequent indictment for the same offense: for, from the nature of the charge, the offense could be committed but the once; and if he was once acquitted upon the general charge of murdering John Frieze, upon settled principles, that would be an ample defense to any subsequent charge for the murder of him, however made, or upon whatever evidence it might be attempted to be sustained.

We do not, therefore, think that the means, mode, or circumstances of the commission of the crime of murder are necessarily embraced in "the nature and cause of the accusation," in the sense of the constitution, and of which the accused has the right to demand information in the indictment. They are rather matters of evidence to establish the charge. The forms of proceeding in which these particulars were observed have been established by long usage; but, for the most part, they are but modes of proceeding which the legislature has the undoubted power to change or modify. That power they have thought fit to exercise in the enactment of the statute under consideration, and we are satisfied that it does not infringe any substantial right intended to be secured to the accused by the constitution. This ground of error is, therefore, not tenable.

The second error assigned is the exclusion of certain declarations of the accused, brought out upon cross-examination of the state's witness, Brown, which were, in substance, that shortly before the killing took place, and while the witness and the accused were sitting at the place where it occurred, and before the deceased came to the place, the accused said to Brown, that he

had been told by others that if they were in his place, and had been treated by the deceased as the accused had been, they would kill Frieze; but that he had no harm against him, and would not hurt a hair of his head; and this was just before the deceased came up to the place where he was shortly afterwards shot by the accused.

These declarations, it is contended, were part of the *res gestæ*, and should, therefore, have been admitted in evidence in behalf of the accused.

It appears that they were made in the absence of the deceased, and when, according to the positions taken in the defense, the accused did not suspect that the scene which shortly afterwards occurred would take place. They were, therefore, neither part of, or directly connected with, the killing, but were mere independent statements of the party in regard to his then state of mind towards the deceased. In order to render declarations evidence in behalf of the party making them, they must be made contemporaneously with the main fact which they are offered to illustrate, and while the transaction which is proposed to be explained or characterized.[1] Holman v. Murdock, 34 Miss., 286; Meek et al. v. Perry, at October Term, 1858, not yet reported. When so made, they become facts, which are identified with the transaction, and are proper to be considered in determining its true character. But when made before the transaction between the parties is entered upon, they are the mere declarations of the party making them, and are not admissible in evidence in his behalf. To admit such declarations in evidence in his behalf would be to allow a party to make evi-

[1] 1 Greenl. Ev., 108; Enos v. Tuttle, 3 Conn. R., 250; Russ. on Cr., 750; Rawson v. Haigh, 2 Bing., 104; Ridley v. Gyde, 9 ib., 349, 352; Pool v. Bridges, 4 Pick., 379; Allen v. Duncan, 11 Pick., 309; Haynes v. Rutter, 24 Pick., 242; Gray v. Goodrich, 7 Johns., 95; Bank of Woodstock v. Clark, 25 Vermont, 306; Mitchem v. State, 11 Georgia, 615; Tomkies v. Reynolds, 15 Ala., 109; Cornelius v. State, 7 Eng., 382; and see *In re* Taylor, 9 Paige, 611; Carter v. Buchanan, 3 Kelly, 513; Blood v. Rideout, 13 Met., 237; Boyden v. Burke, 14 How. S. C. R., 575; Fanner v. Turner, Clarke (Iowa), 533; Elkins v. Hamilton, 20 Vermont, 627; Noyes v. Ward, 19 Conn., 250; Corinth v. Lincoln, 34 Maine, 310; Story on Bailments, § 339; citing Tompkins v. Saltmarsh, 14 S. & R., 275; Beardslee v. Richardson, 11 Wend., 25; Doorman v. Jenkins, 2 Ad. & Eld., 80; Hadley v. Carter, 8 N. H., 40; Lund v. Tyngsborough, 9 Cush., 36. Upon any inquiry as to the state of mind, sentiments, or dispositions of a person at any particular period, his declarations and conversations are admissible. They are part of the *res gestæ*. 1 Greenl. Ev., 108; Barthelemy v. People, 2 Hill (N. Y.), 248, 257; Wetmore v. Mell, 1 Ohio (N. S.) R., 26; 1 Greenl. Ev., 102; Nutting v. Page, 4 Gray, 584.

dence for himself, and, if believed, to disprove the imputation of malice, clearly apparent from the circumstances. This would be against all principle, and productive of great evil. Such is the character of the declarations in question, and the court properly excluded them.

The third assignment of error relates to the exclusion of the testimony offered in behalf of the accused, and set forth in the second bill of exceptions. This testimony was, in substance, that about six weeks or two months before the killing, the deceased had commenced a quarrel with the accused, during which the deceased assaulted the accused, and struck him one or two severe blows on the head with a loaded cane, which felled him to the ground, inflicting a severe wound on his forehead. That the witness and others helped the accused up, and took him to water in a branch which was near, to wash off the blood; and the accused stepped into the water, and the witness pulled him back, and told him to stop and wash off the blood; and he asked how the blood came on him, and when told that deceased had struck him, he inquired what he had struck him for, as he had nothing against the deceased. And in order to show the relevancy of this testimony, other witnesses were offered, to prove that the deceased said on that day, that he expected he had killed the accused, and would have to leave the country; that if he had not, he would kill him. That he afterwards said that he had not killed the accused, but would do so if he ever crossed his path. It was admitted by the accused that these threats of the deceased were not communicated to him before the killing. This evidence was excluded, except that part of it which related to the assault and beating with the cane, and the conduct and conversation of the accused when taken to the water, and while the witness was washing off the blood; and this part of the testimony was allowed to go to the jury, in order to show the condition of the mind of the accused, and upon the point of his sanity.

It is insisted that the testimony thus rejected was competent to show the intent with which the killing was done, by presenting to the consideration of the jury the cruelty and ferocity of the conduct of the deceased in assaulting and beating the ac-

cused, showing the character of the deceased, and the just apprehension of the accused at the time of the killing, that he was then in danger of his life, or of great bodily harm from the deceased. But this view is wholly untenable. It does not appear from the evidence that the deceased made any hostile demonstration against the accused at the time of the killing, nor even that the threats, which he had previously made against the accused, were known to the accused. The latter had no reason to believe that the feelings of hostility, which caused the deceased to assault and beat him on a previous occasion, still continued in his mind, much less that there was danger of a deadly assault upon him by the deceased at the time of the killing. The conduct of the deceased on the previous occasion was, therefore, not a sufficient ground to justify the accused in acting on the belief that his life was in danger, at the hands of the deceased, at the time of the killing. It is well said by Chief Justice Ruffin: "The belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately." State v. Scott, 4 Iredell's Law, 415. In this case the accused could not reasonably have acted on such a belief at the time; for the deceased was unarmed, and does not appear to have been in possession of any instrument with which to make a deadly assault, and the accused was armed with a gun and pistol, and was so located towards the deceased that he could readily have used his arms in case of any hostile demonstration on the part of the deceased.

The effect of this evidence, had it gone to the jury, might have been, then, to operate in justification of the killing by the mere fact that the deceased had severely beaten the accused some six weeks or two months previously, which would have been clearly incompetent. The testimony was, therefore, properly excluded.

The fourth error assigned is the action of the court in permitting the question to be propounded to the witness of the accused, Mrs. Newcomb, upon cross-examination, whether she did not say to the accused, at the wheat harvest of 1858, at the din-

ner-table at her house, and in the presence of J. Lambert, that if the accused "did not kill John Frieze she would not own him as her son." This question was propounded with the avowed purpose of producing Lambert to testify that she had made such statement, if she denied it. It was not objected to by the witness, but by the accused, on the grounds—1st. Of irrelevancy; and, 2d. Of incompetency, as a foundation to impeach the witness' credit; and, 3d. Because it might tend to criminate the witness. The court overruled the objection, and directed the witness to answer, unless she claimed her privilege not to answer it on the ground of its tending to criminate her. To this ruling exception was taken, and the witness then answered that she did not make the statement.

Upon the first ground of exception, it is insisted that it was irrelevant to the issue on trial, whether the witness made the statement alluded to or not. But the question was put for the avowed purpose of introducing another witness to testify that she had made the statement, if she denied it. The purpose was to discredit her testimony, or to destroy or impair its weight before the jury. It was certainly material in determining the issue on trial to ascertain whether the witness, on whose testimony the defense of the accused mainly rested, was entitled to credit, or was under such a state of feeling and bias in relation to the matter involved in the trial, and which gave rise to it, as to impair or destroy the weight to be given to her testimony. Such an inquiry, therefore, is not irrelevant to the issue. If the witness answer in the affirmative a question whether he has not made statements or done acts in relation to the matter involved in the issue, going to show a strong feeling or bias on his part, touching the main fact, which gave rise to the trial, and in justification or condemnation of the party on trial, that fact would certainly be proper to be weighed by the jury, in considering the weight to be given to his testimony. But if the witness, on examination, deny the statements about which he is questioned, if it be plainly connected with the matter in issue, it appears to be just that it should be proved by other witnesses that he has made the statements or done the acts attributed to him, and this for the double purpose of showing his bias and undue feel-

ing in the matter, and of contradicting and discrediting him. If the matter inquired of be disconnected with the fact involved in the issue, and collateral to it, it is well settled that the answer of the witness cannot be contradicted by other testimony, because that would lead to multiplicity of issues to be determined on the trial. But it is equally well settled, that it is competent to contradict the testimony of a witness who, upon his examination, has denied that he had used expressions or done acts in relation to the matter involved in the issue, showing that he is under a bias or undue feeling against the opposite party involved in the transaction which forms the subject-matter of the issue; as that he has expressed feelings of revenge towards him, or stated that he would give evidence against him.[1] 1 Stark. Ev., 190 (7th Amer. edit.); Rex v. Yervin, 2 Camp., 638; Att'y General v. Hitchcock, 1 Wels. Hurl. & Gordon, Exchequer Rep., 90; Atwood v. Welton, 2 Com. Rep. (N. S.), 66. Such an inquiry is important to show the state of mind and feelings of the witness towards the opposite party involved in the issue, and hence it is relevant to the issue, not as having a direct effect upon the issue, but in order that the jury may determine how far he is to be believed in his testimony as to the facts directly connected with the issue. Attorney General v. Hitchcock, and Atwood v. Welton. It is a general rule, that anything legitimately tending to show that a witness is under undue feeling or bias for or against a party to an issue in which he testifies, may be shown to the jury, to enable them to graduate the true weight of his testimony; and no just reason is perceived why this rule is not applicable to statements made, or acts done by him, in relation to the subject-matter of the issue. If he denies such statements or acts, and they are shown to be true as alleged, it appears manifestly to be proper, in the ascertainment of the truth of the issue, both that his bias and undue

[1] 1 Greenl. Ev., 450; see also Rex v. Yervin, 2 Campb., 638; Martin v. Farnham, 5 Foster, 195; Drew v. Wood, 6 ib., 363; Cooley v. Norton, 4 Cush., 93; Long v. Lamkin, 9 ib., 361; Newton v. Harris, 2 Selden, 345; Commonwealth v. Byron, 14 Gray, 41; Thomas v. Davis, 6 C. & P., 350; 2 Russ. on Crimes, 914; Edmunds v. Walter, 3 Stark. N. P. C., 7 (14 Eng. Com. Law R., 145); 2 Phill. Ev., 955, *et seq.*; see Roscoe Cr. Ev., 351; Roscoe Dig. N. P. Ev., 172, 173, 188, 189, 190; Edmunds v. Walter, 3 Stark., 7; Coles v. Coles, L. R., 1 P. & D., 70; Carpenter v. Wall, 11 Ad. & E., 803; Wharton Am. Cr. Law, 817; People v. Austin, 1 Parker C. C., 154; Gaines v. Commonwealth, 14 Wright, 327.

feeling should be proved, and that his credit should be impeached by proving the falsehood of his denial. And this is especially true where, as in this case, the witness bears a near relationship to the party for whom she testifies, and her testimony in his behalf is in conflict with that of other witnesses in the case.[1]

As to the propriety of first interrogating the witness whether he made the statements, thereby giving him an opportunity to meet the inquiry with a full knowledge of its object and extent, the rule appears to be well settled in favor of that practice, upon principles of justice to the witness who is proposed to be contradicted. 2 Phill. Ev. (Cowen and Hill's notes) 959, 4th Am. ed.; 1 Greenl. Ev., § 462.

This disposes of the first and second grounds of exception taken to the question.

The third ground of exception is that the question might tend to criminate the witness, by implicating her in the charge of killing the deceased.

If this objection had been made by the witness, it might have exempted her from answering the question. But this is the privilege of the witness, given him by the law, and secured to him by the constitution, for his own protection. It was the duty of the court to apprise him of his privilege—and that was done here—but not to prevent her from answering if she thought fit to answer, after being informed that she had the right to decline an answer.[2] 1 Greenl. Ev., § 451. And counsel will not be permitted to make the objection. Ib.

It is said that the refusal to answer, because of the tendency of the question to criminate the witness, would cast disparagement upon her, and have the same prejudicial effect upon her credit as if she admitted the charge involved in the question; and hence, that the question ought not to be permitted. But the courts are always careful to prevent this effect, by telling the jury that no such inference can be drawn from the witness' declining to answer. 2 Phill. Ev., 950, and cases there cited.

[1] See note, page 286, *supra*, cases cited.

[2] Thomas v. Newton, 1 M. & Malk., 48, note; Rex v. Adey, 1 M. & Rob., 94; Commonwealth v. Shaw, 4 Cushing, 594; Roscoe N. P. Ev., 181, 178.

The objection under consideration has sometimes been sanctioned in England; but the contrary rule, holding that the question may be asked, is well settled there, and is considered as established law in the courts of this country. 1 Greenl. Ev., § 451, and cases there cited; Southard v. Rexford, 6 Cow., 254; United States v. Craig, 4 Wash. C. C. R., 729; Torre v. Summers, 2 Nott & McCord, 267; Treat v. Browning, 4 Conn., 408.

This rule does not appear to be affected by the provisions of the constitutions of the United States and of this state, that no party shall be compelled to give evidence against himself in a criminal prosecution. For he is not "compelled" to testify, under the rule as above stated, but may always protect himself by claiming his privilege; and this is the rule held by the courts in this country, notwithstanding the immunity secured to such persons by the Constitution of the United States, and of the states in which this rule has been held.

We, therefore, think that this question, as put to the witness, was properly allowed by the court; and upon the same reasons, we think that the court acted correctly in admitting the testimony of the witness Lambert, to prove that Mrs. Newcomb had made the statement mentioned in the question put to her, and which she denied having made. And this disposes of the fourth and sixth assignments of error.

The fifth error assigned, relates to the exclusion of threats alleged to have been made by the deceased against the accused at some time before the killing, not specified, but which were not communicated to the accused. This ruling was clearly right, as is above shown upon the third assignment.

The seventh assignment is taken to alleged errors in the several instructions granted at the instance of the state.

We have carefully considered these instructions, and the objections which have been urged against them by the learned counsel of the plaintiff in error; but we are unable to perceive in them any error which would justify a reversal of the judgment. For the most part, they state rules of law which have repeatedly received the sanction of this court, so that they are

not now subjects for discussion. It is, therefore, needless to state reasons to show their correctness.

But it is proper to notice the objection taken to the eighth instruction. In the two instructions preceding that, the court instructed the jury, that mere weakness of mind would not excuse a party in the commission of a criminal act, if he had capacity and reason sufficient to enable him to distinguish between right and wrong in that act; and that the law presumes every person of the age of discretion to be of sufficient mental capacity; and to defeat that presumption, the mental imbecility of the party must be affirmatively established by positive or circumstantial evidence. The eighth instruction then states, that "it is not sufficient to show that such a state of mind was possible; nor is it sufficient if the proof merely showed it to have been probable."

The objection taken to this instruction is, that it is sufficient to warrant the acquittal of a party indicted for a criminal act, that the evidence renders it probable that he is innocent; and upon the same principle, when the evidence leaves it merely probable that a party is deficient in mental capacity, that he should be held as mentally incapable of committing a crime, and, therefore, be acquitted. But this is founded on a misapprehension of the rules of presumption, which are quite different in the two cases. In the former, the law presumes every man innocent until his guilt is established by proof; and hence, if the evidence renders it probable that he is innocent, it cannot be said that his guilt is proved, and therefore the presumption of innocence stands, and he must be acquitted. But in the latter, the presumption is that a man is of sane mind; and unless that presumption be removed by proof, it must likewise stand. Hence, if it be established by legal evidence, that he has committed an act criminal in law, the presumption of law being that he was of sane mind, that presumption is not overcome by the mere probability that he was insane, but will stand until overthrown by evidence; and, therefore, mere probability of insanity cannot prevail over the presumption of sanity, so as to work the acquittal of the party on the ground of insanity. Accordingly, it is laid down, that in order to

establish a defense on the ground of insanity, it must be clearly proved.[1] 2 Greenl. Ev., § 373.

The instruction, therefore, though somewhat objectionable in its phraseology, contains a correct rule of law, and is not obnoxious to the objection urged against it.

The eighth error assigned is, that the motion for a new trial was improperly overruled.

The first ground here taken is, that the verdict was not supported by the evidence. If the jury gave full credit to the two witnesses on the part of the state, who witnessed the killing, over the testimony of Mrs. Newcomb, the principal witness for the accused, it is clear that the evidence warrants the verdict. Several objections are urged against the credit and weight due to those witnesses, by reason of improbabilities, and certain discrepancies in minor things, stated by them. But these were matters proper to be considered and determined by the jury; and we cannot say that they erred in giving weight and credit to the testimony of those witnesses over that of the principal witness for the accused.

The second ground is the affidavits of one physician and of the jailor, in relation to the state of mind of the accused at the time of the trial, and tending to show that he was in a condition of mental imbecility at the trial, and immediately afterwards. These affidavits appear to have been made shortly after the verdict was rendered. They relate to a ground of defense which was set up on the trial, and are at least but cumulative evidence upon the question of sanity; and it does not appear that the evidence was discovered after the trial, or that it was not within the power of the party at the time of the trial. Upon well-settled rules, therefore, these affidavits were insufficient to support the motion for a new trial.[2] But, in addition to this,

[1] Wharton's Am. Cr. Law, 55, 711; U. S. v. Lawrence, 4 Cranch C. C., 514; Attorney General v. Parnther, 3 Brown C. C., 441; Lee v. Lee, 4 McCord, 183; State v. Starke, Strobb., 479; People v. Robinson, 1 Parker C. C., 495; Rex v. Layton, 4 Cox C. C., 149; U. S. v. McGlue, 1 Curtis, 1; Graham v. Commonwealth, 16 B. Monroe, 587; State v. Spencer, 1 Zabriskie, 202; Lake v. People, 1 Parker C. C., 495: Bovard v. State, 30 Miss., *supra*, note; Kelly v. State, 3 S. & M., 518; State v. Marler, 2 Ala., 43.

[2] Wharton's Am. Cr. Law, 3179; State v. Blennerhassett, Walk., 7; Com. v. Flannagan, 8 Watts & Serg., 415; U. S. v. Gibert, 2 Sumner, 97; State v. Larrimore, 20 Mo., 425; White v. State, 17 Ark., 404; State v. Stumbo, 26 Mo., 306; Bixly v. State, 15 Ark., 375; Gardner v. Mitchell, 6 Pick., 114; Yarmouth v. Dennis, ib., 116; Sawyer

the facts stated in the affidavits, which are of course *ex parte*, appear to be in the highest degree improbable, and inconsistent with the condition in which the accused must have appeared, pending the trial. For if the condition of his mind had been, at the time of the trial, such as is stated in the affidavit of the jailor, it is unaccountable that no effort was made on the trial to prove it, and make it a special ground of defense.

The last error assigned is founded upon the special *venire facias*. But this cannot be noticed, because the *venire facias* is not properly a part of the record; and no objection upon the ground here stated was taken in the court below.

After a careful examination of the record, and due consideration of the able and ingenious argument of the counsel in behalf of the plaintiff in error, we are satisfied that there is no error in the record which would justify a reversal of the judgment; and it must be affirmed.

v. Merrill, 10 Pick., 16; Chambers v. Chambers, 2 A. K. Marshall, 348; Ames v. Howard, 1 Sumner, 482; Alsop v. Ins. Co., ib., 451; Bullock v. Beach, 3 Vermont, 72; Den v. Geiger, 4 Halst., 228; Pike v. Evans, 15 Johns., 210; Steinback v. Ins. Co., 2 Caines, 129; Smith v. Brush, 8 Johns., 84; Whiteback v. Whiteback, 9 Cow., 266; Reed v. Grew, 5 Ham., 375; Wheelwright v. Beers, 2 Hall, 391; Guyott v. Butts, 4 Wend., 579; People v. Superior Court of New York, 10 Wend., 285; Com. v. Williams, 2 Ashmead, 60; Moore v. Phila. Bank, 5 S. & R., —; Roberts v. State, 3 Kelly, 310; Com. v. Murray, 2 Ashmead, 41; Giles v. State, 6 Geo., 276; State v. Carr, 1 Foster, 166; State v. Larimore, 20 Mo., 425; 1 Gra. & Wat. on N. T., 486, *et seq.*; 2 Tidd., 936; 2 Arch., 224; Gra. Prac., 511; Smith v. Brush, 8 Johns., 84; Pike v. Evans, 15 Johns., 210; Hilliard on N. T., 380, § 13; Harnsbarger v. Kinney, 13 Gratt., 511; Bagge v. Lynch, 22 Mo., 563; Dossett v. Miller, 3 Sneed, 72; Stimpson v. Wilson, 6 Ind., 474; Ferrin v. Protection Ins. Co., 11 Ohio, 147; Schlencker v. Risley, 3 Scam., 483; Smith v. Shultz, 1 Scam., 499; Brown v. Stacy, 5 Pike, 403; Wiggin v. Coffin, 3 Story, 1; Den v. Wintermute, 1 Green, 177; Jennings v. Loring, 5 Ind., 250; Jones v. White, 11 Humph., 268; Palmer v. Fiske, 2 Curt., 14; Ham v. Ham, 39 Me., 263; Gardner v. Gardner, 2 Gray, 434; Wrights v. Greenwood, 17 Geo., 418; Latham v. Selkirk, 11 Tex., 314; Castro v. Wurzbach, 13 Tex., 128; Wells v. Sanger, 21 Mo., 354; Live, &c., v. Oregon, &c., 7 Cal., 40; Coggin v. Jones, 29 Geo., 257; Milton v. Blackshear, 8 Florida, 161; Manix v. Mallory, 7 Clarke, 81; Stewart v. Hamilton, 19 Tex., 96, Handley v. Call, 30 Me., 9.

WILLIAMS v. STATE, 37 Miss. R., 407.

HOMICIDE.

A person over the age of sixty years is incompetent as a juror, and may be challenged for cause by either party; but if he sit without objection, the verdict for that cause will not be vitiated. 2 Bay, 150; 4 Dall., 353; 2 Nott & McCord, 261.

Error to De Soto circuit court. CUSHMAN, J.

Watson, Craft & Foote, for plaintiff in error.

Under the provision in Rev. Code, 497, art. 126, Yarbrough was an incompetent juror, and the verdict, therefore, was erroneous and invalid. Carpenter v. State, 4 How., 163; Bone v. McGinley, 7 How., 671.

The fact that the defendant was not aware of the incompetency of the juror, and made no objection, does not lessen the strength of the foregoing rule. Seal v. State, 73 S. & M., 286.

P. T. Scruggs, on same side.

T. J. Wharton, attorney general.

The objection to the juror came too late. The Rev. Code, 572, art. 7, provides, that "no verdict or judgment shall be arrested, reversed, or annulled, after the same is rendered, for any defect or omission in any jury, either grand or petit, &c. See also Rev. Code, 613, art. 250. The silence of the defendant was a waiver of all objections.

That which is cause for challenge is not always cause for a new trial; for example, that one of the jurors was an alien. 2 Bay, 150; 4 Dallas, 353; 2 Bay, 153; 2 Black, 114; 17 J. R., 133; 2 Nott & McCord, 261; 1 Yerg., 206.

HANDY, J.:

The plaintiff in error having been indicted and convicted for manslaughter, moved for a new trial, on the ground that one of the jurors who sat on the trial was above the age of sixty years, and disqualified to sit, in virtue of the statute. Rev. Code, 497, art. 126. It appeared, on the hearing of the motion, by the affidavit of the juror, that he was above the age of sixty years at

the time of the trial, and that he so stated to the court upon his preliminary examination, and that his statement was probably misunderstood. It was also shown by the affidavits of the accused and of his counsel, that although the statement of the juror in regard to his age was made in their presence, yet that they were ignorant of the fact until after the verdict was rendered. The motion for a new trial was overruled, and the case is brought here by writ of error.

The only error assigned is, that the court below should have granted the motion for a new trial; and it is insisted that the juror was under a legal disqualification from sitting on the jury by reason of his age, in virtue of the provisions of the statute above referred to; that hence the jury was not a legal one, and that the verdict was therefore illegal. But we do not agree with this view of the subject.

The statute, it is true, appears to prescribe the qualifications of jurors, and to exclude from the list of qualified jurors persons of certain ages, among which are those "over the age of sixty years." Such persons are clearly rendered incompetent by the statute; and upon the challenge of either party, and the fact being made to appear, the juror would be rejected, as a matter of course. But does the objection necessarily vitiate the verdict, and render it illegal and erroneous, or is it not of such a character as that it may be waived by the parties, so as to preclude them from taking advantage of it after verdict? Such appears to be the view taken of it by the courts in this country.

The statute entitles the accused, in capital cases, to a copy of the list of the special *venire* summoned to try him; the reason of which is, that he may be enabled to inquire into the characters and qualifications of the persons summoned to sit as jurors in his case. He is then allowed the right of peremptory challenge to a certain number, and the general and unrestricted right of challenge for cause. It thereby becomes his duty to inquire into the qualifications of the persons tendered to him; and if he neglects to do so, it operates as a waiver of objections. If the result of a trial, under such circumstances, were an acquittal, it could scarcely be said that the verdict was illegal and void, and that the case should be tried *de novo;* but both parties, by their

neglect to avail themselves of the objection at the proper time, would be held to have waived it. The sitting of such a juror being a matter to which the parties may give their consent, either expressly or tacitly, if they do so, they are not to be heard to raise the objection after an experiment has been tried for a verdict in their favor, by a jury to which they have consented. 2 Bay, 150; 4 Dall, 353; 2 Nott & McCord, 261.

Let the judgment be affirmed.

McCarty v. State, 37 Miss. Rep., 411.

Placing Obstructions on Railroads.

All laws and parts of laws enacted prior to the adoption of the Revised Code of 1857, and in conflict therewith, were, by articles 2 and 3, page 43, of the Code, repealed. Therefore, so much of the charter of the Mississippi Central Railroad Company as makes provisions for the punishment of persons placing obstructions on the track of the road, being a public law, and a matter of special provision in articles 163 and 164, p. 600, of the Revised Code, is superseded and repealed.

An indictment that charges the accused with "wilfully and maliciously placing an obstruction on" a certain railroad named, "which obstruction was of such a nature to endanger the lives of persons being carried on said road," is sufficient under the Rev. Code, p. 600, art. 164.

The day on which an offense is charged to have been committed is immaterial, except in those cases where time is of the essence of the offense, or a necessary ingredient in its description; and hence in a case not within the above exception, proof that the offense was committed either before or after the day laid in the indictment, but before the indictment was found, and within the period prescribed by the statute of limitations, is sufficient.

Error to LaFayette circuit court. Cushman, J.

The nature of the indictment is fully set out in the opinion of the court.

The plaintiff in error moved the court to quash the first count in the indictment, because the clause in the charter of the Mississippi Central Railroad Company, upon which it was based, was not in force, but had been superseded and repealed; and the court overruled the motion, and the plaintiff in error excepted.

The plaintiff in error was then arraigned, and pleaded not guilty.

The state proved, by Mr. Smith, that he went from Abbeville

to Mount Vernon church, a distance of one mile, on a hand-car, and got there at 8 o'clock P. M. of the 17th of September, 1858. He stood by with a lantern, and saw two negroes, whom he had brought with him, remove the hand-car thirty-one feet from the road. He had the hand-car well scotched with three blocks, and so situated that if the blocks had been removed, the hand-car would have run into a ditch, and could not have run across a bridge on to the road. This was in La Fayette county, Mississippi. Smith then went to church, and saw McCarty, and asked him for a segar, which McCarty gave him. McCarty then asked him if he could ride back to Abbeville with him on the hand-car, and he replied that he had quit carrying such stock last week; and that he, witness, then went to a spring, and as he turned off, McCarty muttered something that he did not distinctly hear. Witness remained at the spring some twenty minutes, and returned and went into church; McCarty came into church, and remained some fifteen or twenty minutes, and went out. In returning from church, after the collision, McCarty said he had told Morgan Williams he expected there would be a collision. The church is one hundred and eighty yards from the railroad. The moon did not rise until after the collision; there was a protracted meeting going on at the church. Witness had gone to the church six or seven nights in succession, in the hand-car, and had put it in the same place, and scotched it in the same way, and that McCarty had not been at church before that night. Witness was in the employment of the railroad company, as overseer of the section hands, and had the use of the hand-car to go up and down the road. He left the negroes at the church when he went to the spring; knew very little of the whereabouts of the negroes while at church. It would have required three stout men to have placed the car-wheels on the track, but one man could run the car across the bridge on the track.

Miller testified that Smith and McCarty came into the store where he was clerk, next morning after the collision; that after Smith had left, McCarty said he knew who Smith suspected; that he suspected Couch and Vaughan; that he, McCarty,

saw Couch and Vaughan coming from the direction of the railroad a short time before the killing.

Dogan, for the state, testified that he came with Smith to church in the hand-car; had come six nights in succession with him; that three negroes came with them; that the car was removed thirty-five feet from the railroad, and well scotched. McCarty told witness that night, after the collision, that he knew the hand-car was on the track; that he made no reply to that remark of McCarty's. Dogan was then asked by prisoner's counsel why he did not make some reply, as he knew the hand-car had been removed? Dogan then said he did say to McCarty, that if the car was on the road, somebody put it there. Dogan was then asked "if he did not say before the committing court that McCarty said he told Morgan Williams that he expected the hand-car was on the road, and if Smith did not take it away, it would be smashed up?" and he answered, "Yes." He was then asked, "Is that what you say now?" and he answered, "Yes."

Owens, for the state, testified that he saw McCarty start off in the direction where the collision took place on the railroad; he was gone about half an hour; but witness was in church, and did not see him proceed beyond the corner of the church, and does not know what direction he then took.

Farr, for the state, testified that he saw McCarty pass the first window, passing rather in the direction of the railroad, but did not see him after he passed the second window; and shortly afterwards saw him returning; that others were passing about, and in the direction of the railroad. Witness was one of a mob who attempted to drive McCarty from Abbeville.

R. Owen, for the state, testified that he and McCarty were sitting together when they heard the collision take place, and McCarty remarked to him, that he expected the hand-car was smashed up; that this remark was in reply to a remark which he, witness, made, that he expected they had run over a horse or a cow.

Meadows, for the state, testified that he saw McCarty going off in the direction of the railroad; he saw him going in that direction for about fifty yards; he was gone about fifteen min-

utes; and when he returned, heard him say to two or three persons that the hand-car was on the road; that this remark of McCarty's made no impression upon him; he did not believe McCarty.

The state then proved by Robinson that the railroad was obstructed, and the obstruction was such as to endanger life or limb.

Long, for the state, proved that Vaughan was in church the whole evening, and did not go in the direction of the railroad.

The state proved by Couch that he was one of twenty citizens who determined to drive McCarty from Abbeville; that McCarty left the neighborhood, and did not return until the night of the collision; that he and Vaughan did not go in the direction of the railroad.

It was admitted that the Mississippi Central Railroad Company was chartered, and was running its cars, &c.

After the testimony was closed, the accused moved to exclude the testimony, because all that was proved occurred on the 7th of September, after the time laid in the indictment; but the jury refused to exclude the testimony, and the prisoner excepted.

The jury found the accused guilty on the first and second counts in the indictment, and not guilty on the third count of the indictment. The prisoner then moved for a new trial, and the motion was overruled, whereupon he excepted, and sued out this writ of error.

H. A. Barr, for plaintiff in error.

1. The first count of the indictment should have been quashed, because it is based on the 19th section of the charter of the Holly Springs Railroad Company, which is incorporated into and made a part of the charter of the Mississippi Central Railroad Company, and which has been superseded and repealed by article 164, page 600, of the Rev. Code of 1857.

The Code of 1857, arts. 2, 3, page 43, provides "that all acts and parts of acts, the subjects whereof are revised or consolidated and re-enacted in this revised code, or repugnant to provisions therein, shall be, and the same are hereby, repealed."

The plaintiff in error did not apply for a *supersedeas*. Hence he was sent to the penitentiary, and has been confined there for three months. If he was rightfully convicted under the second count in the indictment, he has already suffered all the imprisonment that the state can legally impose on him.

2. The testimony should have been excluded. Any day anterior, but not subsequent, to the day alleged in the indictment, might have been shown. Oliver v. State, 5 How., 14; Rex v. Charnox, Holt, 301; 1 Salk., 288; 9 St. Tr., 58–605, 542–552; Foster, 7, 8; 9 East, 157; 1 Phill. Ev., 203; Rex v. Levy, 2 Stark. N. T., 458.

3. The evidence was only circumstantial. The rule is, that the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion. 1 Greenleaf Ev., § 34.

T. J. Wharton, attorney general.

1. The action of the court in sustaining the first count of the indictment was correct. The section of the statute under which it was framed is not repealed by the Revised Code, 600, art. 164. The act and this provision of the code are exactly alike, and the former is not repealed only by implication; and that cannot be, because statutes are not considered repealed by implication, unless the repugnancy between the new provision and a former statute be plain and unavoidable. 1 Kent's Com., 517, note *b* (8th ed.).

2. The second ground of error is untenable. The offense with which the prisoner is charged, is not one of which time is the essence, therefore a variance in the time of the commission of the offense as laid in the indictment, and as proved, is immaterial. The Rev. Code, 616, art. 266, provides, "that no indictment for any offense shall be holden insufficient, for omitting to state the time at which the offense was committed, in any case where time is of the essence of the offense; nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or a day that never happened," &c.

3. The verdict will not be disturbed unless opposed by a preponderance of the evidence, or based upon no evidence. Ciceley's case, 13 S. & M., 202.

Handy, J.:

This was a prosecution against the plaintiff in error, for placing obstructions on the Mississippi Central Railroad.

The indictment contained three counts: the first charging, that the defendant "wilfully and maliciously did place an obstruction on said railroad, which obstruction was then and there of such a nature as to endanger the lives of persons being carried on and upon the said railroad, contrary to the form of the statute," &c.; the second charging, that the defendant "did wantonly obstruct the Mississippi Central Railroad"; the third charging, that the defendant "did maliciously and wilfully place an obstruction on said railroad, by means of which said obstruction so placed on the said railroad, a locomotive, being then and there a vehicle of said Mississippi Central Railroad Company, then and there running on said railroad, did diverge from the track thereof, against the form of the statute," &c.

The defendant moved the court to quash the first count, because the clause in the charter of the Mississippi Central Railroad Company, upon which it is based, was not in force. But the court overruled the motion, and this is the first error assigned.

We are of opinion, that the clause of the charter of the railroad referred to, was repealed and superseded by article 164, page 600, of the Revised Code. In declaring the effect and operation to be given to the provisions of the Revised Code, it is provided, that the acts enacted by that Code, with certain exceptions, should "supersede all prior statutory acts and clauses therein revised, and thereby repealed," and that "all acts and parts of acts, the subjects whereof are revised, or consolidated and re-enacted in this Revised Code, or repugnant to the provisions therein contained, shall be and the same are hereby repealed, subject, however, to any express regulations relating thereto, which may be contained in this Code." Rev. Code, 43, arts. 2 and 3. It is manifest from these provisions,

that it was the intention of the legislature to reduce into one, all the statutory enactments in relation to any particular subject-matter, wherever the same was made a matter of special provision in the Code; to establish a uniform rule upon the subject, and to repeal or modify all prior acts containing different provisions, and coming plainly within the scope of the rules declared by the Code.

The subject-matter of providing for the offense of placing obstructions on the Mississippi Central Railroad, endangering life or limb, was embraced in the law of the state, as enacted by the charter of that company. That act was, in that respect, a public law of the state, for the punishment of crime; and when the act of the Revised Code, 600, art. 164, was passed, it was a revision of the law upon the same subject, and the re-enactment of a general and uniform rule in relation to it, which, under the provisions of articles 2 and 3, superseded and repealed prior enactments, containing different provisions, including that contained in the charter of this railroad company.

But, notwithstanding this, we think that the court acted properly in refusing to quash the first count in the indictment; because we are of the opinion, that that court is sufficient, under Art. 164 of the Code. It is thereby enacted: first, "that if any person shall wantonly or maliciously injure or place any implement or obstruction on any railroad in this state," or, secondly, "do any other act, by means of which any car or vehicle shall diverge or be thrown from the track thereof, such person shall be imprisoned in the penitentiary not longer than ten years." The first count in this indictment charges, that the defendant "wilfully and maliciously did place an obstruction on said railroad;" and adds, "which obstruction was of such a nature as to endanger the lives of persons being carried on said railroad." This addition, it is true, appears to have been made with reference to the terms employed in the charter of the railroad company, defining one class of obstructions placed upon the road, the punishment of which was thereby provided for. But the constituents of the offense, as declared by the act in the Revised Code, above referred to, are fully stated in the court, independently of this addition, and no

additional force is given to the charge stated in the count, when tested by the article of the Code, by the superadded words, stating that the nature of the obstruction was such as to endanger the lives of passengers. For not only are the essential words of the statute used in the count, but they appear, from the nature of the thing, to impart what is stated in the superadded words relative to the nature of the obstruction. A wilful and malicious obstruction placed on a railroad, must in its very nature endanger the lives of passengers in the cars on the road; and it was doubtless for this reason, that words in the act of the Revised Code, descriptive of the nature and effect of such obstruction, were omitted as useless and superfluous.

We are, therefore, of opinion, that the words in this count, descriptive of the nature and effect of the obstruction, are surplusage, and might be stricken out without impairing its legal force; and that the count is good under the provisions of the Revised Code.

The next assignment of error is, that the court overruled the motion of the defendant to exclude all the evidence offered in behalf of the state.

The ground of this motion was that the indictment charged that the offense was committed on the first day of June, 1858, and all the evidence showed that it was committed on the 7th September, 1858, and that the evidence was inadmissible to prove that the offense was commited after the time laid in the indictment. But there is no legal force in this position. The indictment was found at October term, 1858, and time was not of the essence of the offense. It is admitted by the counsel for the plaintiff in error that it would have been competent to prove the commission of the offense at any time anterior to the date laid in the indictment. But upon the same principle by which that would be competent, it may be proved that the offense was committed after the date laid, but before the finding of the bill; for the reason is, that time is not of the essence of the offense, and it is applicable to any time before the finding of the bill, or which would show that the offense was not barred by the statute of limitations, except where time is of the essence of the offense. Miller v. The State, 33 Miss., 356.

The last error assigned is, that the motion for a new trial should have been sustained, on the ground that the verdict was against the evidence. Without a particular statement of the evidence, we deem it sufficient to say that we consider it ample to warrant the verdict of the defendant's guilt.

Let the judgment be affirmed.

STRAWHERN ET AL. *v.* STATE, 37 Miss. R., 422.

GAMING.

It is settled by the courts, both in this country and England, that in point of law there is no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender.

Where the indictment contains two counts, each charging a distinct offense, the defendant has no right to compel the prosecutor to elect upon which count he will proceed; it is a matter within the sound discretion of the court.

Where two are indicted for gaming, and one has plead guilty, and has been fined, he is a competent witness for the defense on the trial of his co-defendant, and it is not necessary to his competency that he has paid his fine.

If an indictment against several persons charge them with the commission of several and distinct offenses, and not with the joint commission of the same offense, it seems that the defendants are competent witnesses for each other, before acquittal or conviction.

In prosecutions for gaming, it is essential that it should be alleged and proven that the defendants had wagered or bet money, or something of value, either directly or indirectly, or that they had, in some way, an interest in the game, and would, by the result, either gain or lose.

Error to Monroe circuit court. ACKER, J.

The opinion of the court contains all the facts of the case.

Rogers & Beckett, for plaintiffs in error.

1. It is insisted for plaintiffs in error that both James Marshall and William Marshall were competent witnesses to prove the innocence of Grizzle and Strawhern, and that the court erred in ruling to the contrary. Jones v. State, 1 Kelly, 610; 1 Greenleaf Ev., § 379.

2. The court erred in refusing the instructions asked by the defendant. The plaintiffs in error were indicted for playing for money; and the first charge was predicated on the position that under the law, the parties were not guilty unless they were in-

terested, either directly or indirectly, in the money bet. If the defendants played at either of the games in the indictment mentioned, and did not bet, then, in that event, they did not play for money. If the charge asked is not the law, then every party who plays for amusement, if any other persons around bet upon the game, the parties playing are the guilty ones. Our law evidently intended to punish those only who play for money.

The second charge is predicated upon the point that it was necessary to prove the charge as laid in the bill of indictment, before the defendants could be convicted. The defendants are indicted for a certain offense, and that is, playing at certain games for money, with James Marshall and William Marshall. Either of the four parties indicted may have played at other times for money; but proof that Strawhern, or Strawhern and Grizzle, or James Marshall or William Marshall, played separately at either of the games for money, did not make the offense specified in the indictment. This offense must be made out by proof that all four of the parties charged played together at the game for money. When the indictment specifies the offense by charging that several parties played together, he cannot convict upon the proof that one party played. Grizzle and Strawhern were indicted for playing with the Marshalls; that offense was identified as being the one at which all four played together; then neither Strawhern nor Grizzle could be convicted of that offense by proof constituting another offense.

The witness for the state expressly stated that he never saw James Marshall, William Marshall, John P. Grizzle, and Samuel Strawhern, playing together at nine-pins or pool.

T. J. Wharton, attorney general.

Each party is charged as a principal. Though all four of the persons indicted may not have played in the same game, and against each other, yet, if the plaintiffs in error played with and against each other for money, still the conviction should be upheld. The other two charged in the indictment pleaded guilty, which was an admission on their part that the indictment was "a true bill." They were no longer parties before the court. The indictment stood as if it had been originally found against

the plaintiffs in error only, and the proof of the only witness is direct, that he had seen them play nine-pins and pool when money was up, and within twelve months before the date of the indictment. It is immaterial whether they wagered any money on the game or played it for others to bet on.

If it be a matter of any importance to show whether the money was wagered by them, or by others not engaged in the game, the *onus* did not rest on the state.

The testimony of the two Marshalls was properly excluded. "One of several persons indicted, although he has pleaded and defended separately, is not a competent witness for his co-defendant, unless immediately acquitted by a jury; and the same rule applies to accessories." Wharton Am. Cr. Law, 303.

"If he is convicted, and the punishment is by fine only, he will be admitted for the others, if he has paid the fine." 1 Greenl. Ev., § 379; Russ. on Cr., 597–600; 1 Lead. Cr. Cases, 14.

One defendant in an indictment cannot, until finally discharged, be a witness for another, and that whether the trial be joint or separate; and where the wife of one is not permitted to testify for the others on a joint trial, she will not be received for them, although her husband be not then on trial. State v. Smith, 2 Ind., 402. The contrary rule prevails in Tennessee and Missouri. 2 Humph., 99; 6 Missouri, 1.

SMITH, C. J.:

This was a conviction, under the statute against gaming. The indictment contained two counts. The first charged "that William Marshall, James Marshall, Samuel Strawhern, and John P. Grizzle, late," &c., "did unlawfully play at a game commonly called "ten-pins," for money, and for one bank-note, then and there, of the value of five dollars," &c. The second charged the same parties in the same form, with unlawfully playing at a certain game called "pool," for money, and for a bank-bill of the value of one dollar. The defendant, William Marshall, pleaded guilty, and was fined. James Marshall was not tried; but a trial was had between the state and the plaintiffs in error, which resulted in their conviction. A motion for

a new trial was thereupon entered, which was overruled, and the defendants excepted, and prosecuted their writ of error.

Before proceeding to trial, the defendants moved to quash the indictment, upon the ground that it charged two distinct offenses; which motion being overruled, the defendants moved to compel the district attorney to elect upon which count of the indictment the trial should proceed. This motion was also overruled, and the action of the court upon it and the preceding motion, is assigned for error.

On the trial, a witness, offered for the prosecution, testified "that within twelve months before the finding of the bill of indictment in this cause, he had seen both the defendants, Strawhern and Grizzle, roll nine-pins, and play at the game called pool, when money was up." On cross-examination, this witness stated that he had never, to his recollection, seen William Marshall, James Marshall, Samuel Strawhern, and John P. Grizzle, play together at a game called nine-pins, or pool; nor did he ever see either of the defendants play together, to the best of his recollection, at either of the above-mentioned games; nor did he remember ever to have seen either of the defendants put up any money at either of the above games; but he saw money staked when they were playing.

The testimony of this witness was all the evidence offered in behalf of the prosecution. The defendants then tendered James Marshall, one of the parties jointly indicted with them, but who was not on trial, as a witness; but he was excluded upon the ground that he was incompetent. William Marshall, who had pleaded guilty to the indictment, and was fined, was also offered as a witness by the defendants, and was likewise for the same reason excluded. The defendants excepted, and the ruling of the court in each instance is assigned for error.

On the evidence before the jury, as above detailed, the court, at the instance of the district attorney, charged, amongst other instructions given to the jury, "that it is not necessary that the defendants, or either of them, should have bet anything on the game at which the money was staked. All who played are guilty. And refused, upon the application of the defendants, to instruct:

1st. "That before the jury can find the defendants guilty under this indictment, they must believe that the defendants played at the game of ten-pins, or pool, for money, in which they were interested either directly or indirectly."

2d. "That unless the jury believe that the defendants unlawfully played at a game of ten-pins, or pool, together with William Marshall and James Marshall, for money, they will acquit the defendants."

And 3d. "That unless the jury believe, from the evidence, that defendants bet or wagered money on the game, or were interested in the money, they will acquit the defendants."

To the granting of the instruction for the prosecution, and the refusal of the court to charge as requested by them, the defendants excepted, and assign, also, this action of the court for error.

We will proceed to notice these several exceptions, in the order in which we have stated them.

1. It is settled in this court, and by the courts in this country, that in point of law, there is no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender. Wash v. The State, 14 S. & M., 120; Sarah v. The State, 28 Miss. R., 267; Kane v. The People, 8 Wend., 203; 12 ib., 425; Chitt. Crim. Law, 253; King v. Strange, 34 Com. L. R., 341; Wharton's Amer. Cr. L., 149. The practice, however, of joining distinct felonies in the same indictment is not to be commended; and although the joinder of distinct offenses in the same indictment constitutes no legal ground for quashing the indictment, if objection on that ground be made before plea, the court, at its discretion, may order the indictment to be quashed, lest it should embarrass the prisoner in his defense, or prejudice him in his challenge to the jury. The reasons are manifest why a more stringent rule should not be applied to prosecutions for misdemeanors. This objection is, therefore, untenable.

2. There was no error in the refusal of the court to compel the prosecuting attorney to elect upon which count of the indictment he would proceed. The answer given to the preceding objection is entirely applicable to this. It was a matter submit-

ted to the sound discretion of the court. 34 Com. L. R., 341; 12 Wend., 425; 22 Pick., 1; 28 Miss. R., 267. And there is nothing whatever in the record which tends to show that the defendants were in any wise prejudiced by this particular action of the court.

3. The third exception, in our opinion, is well taken. The witness William Marshall, who was tendered by the defendants, and excluded from testifying by the court, had pleaded guilty to the indictment, and was fined. It is true that it does not appear that he had paid the fine. But this fact can have no effect upon his competency as a witness for the defense. The prosecution as to him was at an end. He could, in no conceivable way, be affected by the result of the trial then pending, and hence could have no motive for swearing falsely in order to produce an acquittal of the parties then on trial. As he was not rendered infamous and incompetent by his confession and the sentence of the court, there seems to be no sufficient reason founded on principle for his exclusion. This view seems to be sustained by authority.[1] Cases cited in Am. Cr. L., 303; Jones v. The State of Georgia, 1 Kelly, 610.

There is an additional reason why this party should have been permitted to testify. The parties indicted were not charged with a joint commission of the offense described in the indictment. They were not charged to have bet money with each other, or to have played with each other for money, at the games mentioned in the indictment. The charges are—1. That the said parties, at a certain time and place, played for money at the game of ten-pins; and 2d. That they played at a stated time and place, for money, at the game of pool.

[1] Ballard v. Noaks, 2 Pike, 45; Carpenter v. Crane, Blackf., 119; State v. Stotts, 26 Mo., 307; Com. v. Smith, 12 Metc., 238; State v. Jones, 51 Maine, 126; Delozier v. State, 1 Head, 45; Rex v. Ford, C. & K., 111; People v. Whipple, 9 Cow., 707; Byrd v. Com., 2 Va. Cases, 490; Bean v. Bean, 12 Mass., 20; Churchill v. Sutter, 4 Mass., 156; McNiff's case, 1 C. H. Rec., 8; State v. Wier, 1 Dev., 363; U. S. v. Henry, 4 Wash. C. C. 428; People v. Lohman, 2 Barb., 216; Brown's case, 2 Leigh, 769; People v. Costello, 1 Denio, 86; Garrett v. State, 6 Mo., 1; see Archbold's Cr. Pr. and Pl., 155, *et seq.*; Roscoe's Cr. Ev., 121; Rex v. Balmore, 1 Hale's P. C., 305; People v. Labra, 5 Cal., 183; Marshall v. State, 8 Indiana, 498; Sloan v. State, 9 ib., 565; Hunt v. State, 10 ib., 69; U. S. v. Henry, 4 Wash. C. C., 428; 1 Greenl. Ev., 379; 2 Russ. on Cr., 597, 600; Rex v. Westbeer, 1 Leach Cr. Cases, 14; Charnock's case, 4 St. Tr., 582; 12 Howell's St. Tr., 1454; Rex v. Fletcher, 1 Strd., 633; 2 Stark. Ev., 9, 10; 2 Hale's P. C., 280; 7 T. R., 611; Musson v. Fales, 16 Mass., 335; Churchill v. Suter, 2 Mass., 163; Townsend v. Bush, 1 Conn., 267; Wharton's Am. Cr. Law, 790, *et seq.*

This was manifestly the construction adopted by the circuit judge, in refusing the second instruction requested by the defendants. For although the statute declares that in prosecutions for gaming "it shall be sufficient to charge the general name or description of the game at which the defendant may have played, without setting forth or describing with or against whom he may have bet or played," it would, nevertheless, have been clearly erroneous to have refused the instruction if under his construction of the indictment the defendants were charged with the joint commission of the alleged offenses. Adopting, then, the construction, which it seems probable the court below applied to the indictment, the parties were in effect severally charged with the commission of separate and distinct misdemeanors, and not with the joint commission of the same offenses. Hence, under the indictment, and in conformity with the statute, it was not necessary to prove that the persons indicted played with each other for money, or bet money with each other, at the games designated in the indictment, but that all that was required to authorize a conviction was the adduction of legal proof that each or either of them played for or bet money on the games described with A.B.C. or D. The question here is not as to the sufficiency or legality of the indictment. That is a question which cannot now be examined; but the inquiry is in relation to its construction. And upon that construction, as the offered witness was charged with an offense separate and distinct from the offenses charged against the other parties indicted, upon no principle of reason or authority should he have been excluded, especially after having pleaded guilty, and received sentence.

4. These observations are sufficient to show that there was no error in the refusal of the defendants' second instruction.

5. The last exception applies to the third charge given in behalf of the prosecution, and to the refusal of the judge to grant the first and third charges requested by the defendants. The action of the court upon these respective charges in effect lays down the rule that persons who play at "ten-pins" or "pool," upon which money is bet or wagered by third parties or by-standers, but who do not themselves, either directly or

indirectly, bet or wager money on the game so played, is nevertheless guilty of a violation of the statute against gaming.

It is scarcely necessary to say that the court, in announcing this proposition, misconstrued the statute against gaming. There are, doubtless, many ways beside that of actually betting or wagering, in which a party may be guilty of a violation of the statute. But here the parties were charged with betting money and a valuable article on the games specified, and not with having encouraged gaming, or with any act which the statute makes criminal. It was hence essential, before a conviction could be had, that legal proof should have been adduced, establishing the facts charged; that is, that they had wagered or bet money, or something of value, either directly or indirectly; or that they had in some way an interest in the game, and would by the result either gain or lose. Under the rule as laid down, a person who not only never intended to violate the statute, but who in point of fact never had, might be convicted and punished.

Judgment reversed, and cause remanded.

GIPSON v. STATE, 38 Miss. R., 295.

ASSAULT WITH INTENT TO KILL.

If there be any doubt or uncertainty in the language employed by a jury in returning their verdict, the judge may make such inquiry of them as will enable him to ascertain their will and intention, and may order that the verdict thus ascertained be recorded.

Where an accusation includes an offense of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious. Whart. Cr. L., § 384. Rev. Code, p. 622, art. 305, § 62. Under an indictment for an assault with intent to kill, the defendant may be convicted of a simple assault.

When the verdict convicts the accused of an offense for which he could be properly tried under the indictment, the unnecessary addition of words descriptive of the offense in point of aggravation, will not vitiate it; and hence, under an indictment for an assault with intent to kill and murder, a verdict of guilty of an assault in the attempt to commit manslaughter will be good; for the verdict is a good finding as to the assault, and the descriptive words may be treated as surplusage.

Error to Warren circuit court. YERGER, J.

Edward Gipson, the plaintiff in error, was indicted for an assault on Jacob Webster, with intent to kill and murder; and was convicted of an assault in the attempt to commit man-

slaughter. The exceptions taken to the verdict of the jury are fully set out in the opinion of the court, together with the facts on which the exceptions are based.[1] The prisoner was convicted of an assault, and was fined by the court in the sum of five hundred dollars, and sentenced to six months' imprisonment in the county jail, and was required to give recognizance, with good security, in the sum of two thousand dollars, to keep the peace and be of good behavior for two years.

From this judgment he prosecutes this writ of error.

C. L. Buck, for plaintiff in error.

The indictment in this case was framed under the first clause of art. 18, sec. 8, of the Rev. Code, p. 575. That clause provides, in substance, that to shoot at or attempt to discharge any fire-arms or air-gun at another, wilfully, with intent to kill and murder, shall be punishable, &c., as therein provided. To complete this offense, no battery is necessary. The legislature evidently intended to prevent the unlawful use of fire-arms, by making a mere assault with such a weapon, when the intent was to kill, an offense of the greatest magnitude.

After clearly defining this offense, and making it to depend upon the nature of the weapon used, the legislature, in the same article, proceeds to define another and distinct class of offenses, and say, "or of any 'assault and battery' upon another with any deadly weapon, or other means likely to produce death, with intent to kill and murder, or to maim, ravish, or rob such other person." Here is created a distinct class of offenses, the guilt of the party being made to depend, not upon an assault merely, but an "assault and battery," with "the intent" to injure the party upon whom the assault and battery is committed. In the preceding class of cases, it is absolutely essential to charge the "intent" correctly, and a variance would be fatal; as, for instance, if the indictment alleged the "intent" to be to kill, &c., A., and the proof showed it was B. against whom the injury was designed. See Jones v. State, 11 S. & M., 315; Morgan v. State, 13 ib., 242; Anthony v. State, ib., 263.

[1] Here followed, in the original report of this case (38 Miss. R., 296), a full statement of the testimony and instructions, which, not being considered by the court, the compiler has thought fit to leave it out.

Where A. was indicted for assaulting, &c., B., with intent to kill him, and the proof showed that B. was shot by A., but the latter intended to shoot C., and not B., and A. was convicted, the verdict was set aside by this court, on the ground that the proof must show the "intent" as laid. If this be correct, how is it possible for a party who is indicted for an assault on A., with "intent" to kill and murder him, to be legally convicted of an assault with intent to commit manslaughter? To punish a class of offenders whose guilt was as great as if an intent existed to injure the wronged party, the legislature has seen proper to create a new offense, and to declare that a party assaulting and beating another, though unintentionally, while the former is engaged in the commission of certain illegal acts, shall be guilty of a felony, and punished as severely as if an intent to injure existed. See Ainsworth v. State, 5 How., 242; Morman v. State, 24 Miss., 54.

The objection to the ruling of the court was made as soon as possible in the motion for a new trial. The indictment for the offense it charged was good; but the objection is, that under the instructions of the court, the jury convicted the defendant of an offense not embraced or charged in the indictment. The instructions being erroneous, and the verdict resulting from them being improper, the motion for a new trial was the proper and only way of correcting the error.

T. J. Wharton, attorney general.

It is clearly competent for the court, when there is any doubt or uncertainty in the language employed by a jury in rendering their verdict, to ask them any questions tending to explain the verdict, and to order it to be amended according to the answers of the jury. If the verdict had been entered as at first presented to the court, it is not perceived that the defendant could claim any benefit from the fact that the jury thought the penalty disproportioned to the offense. The court hears the testimony, and while the offense charged is technically made out, the circumstances attending it may not be marked by any great atrocity; the provocation which caused the attempt to kill may have been wanton and gross, and such as would be well calcu-

lated to arouse resentment in a manly and chivalrous bosom. All these things the court considers within the discretion allowed by law, in determining the length of imprisonment the party shall undergo.

The instructions given for the state were correct. Price v. State, 36 Miss., 531; Wesley v. State, 37 Miss., 327. The modification of defendant's instructions by the court were clearly proper, in order to put the jury in possession of correct rules of law as applicable to the facts of the case. Wray's case, 30 Miss., 673; Price v. State, *supra*.

The motion for a new trial was properly overruled. Even if the evidence was conflicting or doubtful, this was a matter for the jury to determine. They have determined it, and with all their sympathies excited for the defendant, they have pronounced him guilty of an assault with intent to commit manslaughter, and their verdict should not be disturbed.

It is clear that, under the indictment, the jury might convict the defendant of a common assault. The charge is an assault with a pistol (a deadly weapon), and shooting with the same with intent to kill and murder. If death had resulted from such shooting, a conviction for manslaughter could be had. Manslaughter is necessarily included in an indictment for murder, and the statute declares that the jury may convict of any offense necessarily included in the one charged in the indictment, whether the same be a felony or a misdemeanor. Hence the verdict was clearly right. Rev. Code, 622, art. 305.

The indictment was sufficient, and the verdict responsive, under the indictment upon which it was framed. Rev. Code, 575, art. 18.

The defendant having gone to trial on the indictment on the plea of not guilty, is precluded from moving to arrest the judgment for the objection now urged, that being a matter which could have been taken advantage of before the trial. Rev. Code, 573, art. 7.

HARRIS, J.:

The plaintiff in error was indicted in the circuit court of Warren county, for "an assault with intent to kill and mur-

der." The jury returned a verdict as follows: "We, the jury, find the accused guilty of an attempt to commit manslaughter, but earnestly recommend him to the mercy of the court, believing that the higher penalties inflicted for the actual committal of such offenses, would be more severe than the circumstances attending the case would require." This verdict was returned in writing; whereupon the court asked the jury, "if they found the accused not guilty of an assault and battery, with intent to kill and murder, and found him guilty of an assault in the attempt to commit manslaughter? to which they responded, without being polled, in the affirmative. And thereupon the verdict of the jury was entered of record as follows: "We, the jury, find the defendant not guilty of an assault with intent to kill and murder, as charged, but guilty of an assault in the attempt to commit manslaughter on Jacob Webster."

Afterwards, when the minutes were read on the succeeding day, it was moved by counsel for the plaintiff in error, to amend the same by inserting the verdict first offered in writing as above stated, in lieu of the one appearing on the record as stated in answer to the inquiry of the court. This motion was overruled by the court, and exceptions filed; and this ruling of the court is first assigned for error here.

We deem it only necessary to say, in reference to this assignment, that it presents no ground for reversal. The entry in the record is in accordance with the ascertained views of the jury; and it was competent for the court to make such inquiry as would enable it to comprehend the intention and will of the jury in reference to their finding, when, in the opinion of the court, there was any doubt or uncertainty in the language employed by them.

The second and third grounds of error insisted on are, that the court erred in giving, refusing and modifying the instructions asked by the parties.

We have carefully examined the several instructions asked, given, refused and modified, and are satisfied that the plaintiff in error has no right to complain in this respect.

The remaining grounds of error are, the refusal of the motions for a new trial, and in arrest of judgment. These may be

considered together, as the main point relied on is the same in each.

It is urged, under these two last assignments of error, that the defendant was convicted of an offense not embraced in the indictment, under an erroneous instruction of the court.

By the sixth instruction the jury were informed, that if they believed from the evidence, a given state of facts stated in the instruction, "they must find the defendant guilty as charged in the indictment, *or* of shooting in the attempt to commit manslaughter, according as they might believe the fact to be." The jury found "the defendant not guilty of an assault with an attempt to kill and murder, as charged, *but guilty of an assault* in the attempt to commit manslaughter on Jacob Webster."

The question presented is, whether the verdict sufficiently finds an offense known to our laws, and embraced in the indictment under consideration. It is insisted, that no such offense as that described by this verdict is embraced in the *statute*. This may be admitted, without in any manner affecting the validity of this verdict, or the judgment pronounced upon it.

Generally, where an accusation includes an offense of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious. Wharton's Amer. Cr. L., § 384.

Of this the books give numerous instances. A common illustration is, that of an indictment for assault and battery, or an assault with intent to kill, where the defendant may be convicted of assault and battery, or of assault alone. Wharton's Amer. Cr. L., § 385, and numerous cases cited in notes; and §§ 560, 565.

Even where the indictment on its face is for a *complete felony*, while at common law, it has been doubted whether a conviction could be had for the constituent misdemeanor in some of the states, yet, under our statute, Code, 622, § 305, express provision is made, that even in cases of a complete felony, charged in the indictment, the defendant may be convicted of any inferior constituent misdemeanor or offense, necessarily included in the offense charged in the indictment.

In the case before us, the plaintiff in error was charged in the indictment with an assault with intent to kill. The jury find him guilty of an "*assault*," and add words descriptive of no other offense known to the law, but explanatory of the character of the "assault," to wit, "in the attempt to commit manslaughter on Jacob Webster." That an "*assault*" is included in every "*assault with intent to kill*," cannot be denied; and that the jury may so find under an indictment for the greater offense, even in case of felony, we have shown. The only objection, therefore, to this finding, is the addition of the descriptive words. If these words had been descriptive of another offense known to our laws, either not included in the offense charged in this indictment, or if so included, subject to a different mode or degree of punishment than the offense of an aggravated assault, we admit there would be more force in the argument here insisted on. But it is not perceived how the verdict of the jury can be vitiated by the unnecessary detail of the circumstances of the assault, where these descriptive circumstances after all but make the same offense in law. To say that the "*assault*" was committed in the attempt to commit manslaughter, gives character to the "*assault*" in point of aggravation, but does not make it any more or less than an "*assault*" in law, than if they had said the defendant committed an assault in attempting to go to church. The evidence, in the view we have taken of this case, fully justifies the verdict of the jury; and we think there was no error in overruling these motions for a new trial, and in arrest of judgment.

Let the judgment be affirmed.

GIBSON v. STATE, 38 Miss. R., 313.

BIGAMY.

Where a man marries a woman whose husband by a former marriage has been absent and unheard of for five years previous to such second marriage, the law presumes that such first husband is dead, and that the second marriage is valid. Hutch. Code, 977, § 2.

The legal presumption of the death of a husband or wife who has been absent without being heard from for five years, and the consequent validity of a second marriage con-

tracted by the abandoned party, after the expiration of that period, will be acted on in a prosecution for bigamy against one of the parties to such second marriage who subsequently, and during the life of the other, has contracted another marriage.

Error to Warren circuit court. YERGER, J.

The plaintiff in error was indicted and convicted in the court below of bigamy.

The opinion of the court contains a sufficient statement of the case.

Brooke and Smedes, for plaintiff in error.

In prosecutions for bigamy, the death of a person (if the fact of his being alive is material in defense of the accused), will not be presumed from mere lapse of time, unless the period elapsed goes beyond the ordinary habits of human life. Spears v. Burton, 31 Miss., 547; Rex v. Twining, 2 B. & A.

The rule would be reversed, when the fact of a person being alive would be essential to the defense of the accused. The person would be presumed to be alive, notwithstanding he may have been absent or unheard of for more than five years. The presumption of law as to life or death shifts in favor of innocence. If this proposition be true, the bare rumor of the death of Williams, unsupported by any fact except that of his absence, was insufficient to rebut the presumption of law, made in favor of the accused, that he was alive.

The third instruction asked for by the state and given, is manifestly erroneous. Instead of giving to the accused on trial the benefit of the legal presumption of innocence, it gives it to Maria Gibson, a party not on trial, and not even a witness in the case. No matter whether she was guilty of bigamy or not, her guilt or innocence was not in question, and a presumption could not be made in her favor against the accused. The instruction took away from him the presumption of innocence with which the law clothed him, by making an issue between him and her, and giving her the benefit of such presumption.

T. J. Wharton, attorney general.

The conviction in this case was clearly correct, and the judgment should be affirmed. It is an indictment under the law as

it stood prior to the adoption of the new code, the offense having been committed at the date of the marriage to the second wife, which was on the 7th of July, 1857. Hutch. Code, 977. The second section declares that the statute shall not apply "to any person, by reason of any former marriage, whose husband or wife by such marriage shall have been absent for five successive years, without being known to such person within that time to be living," &c.; and upon this principle the said Maria, first wife of plaintiff in error, did not incur the pains and penalties of the act, because more than six years had transpired from the date of her previous marriage to the said E. H. Williams, and very nearly six years had elapsed during which said Williams had absented himself; and, therefore, her second marriage with Gibson was valid. It follows, then, that the plaintiff in error having afterwards remarried, his former wife being yet alive, subjected himself under the statute to a prosecution for bigamy.

Common reputation, and a belief in the family that a party is dead, are competent proof of the fact of his being dead. 1 Stark. Ev. (5th Am. ed.), 158, 159; 2 ib., 605.

The whole reasoning of the court in the case of Spears v. Burton, 31 Miss., 547, relied on by plaintiff in error as an authority justifying a reversal of this case, is a clear recognition of the principles asserted in the instructions given in this case for the state.

It would be a monstrous perversion of the rules of law, and operate as a covert injury to an innocent woman, to indulge the presumption that Williams was yet alive; and that she, instead of the plaintiff in error, is the guilty party. It would be a presumption to favor a guilty party, and subject an innocent one to a prosecution for bigamy. The first marriage was solemnized in due form of law. This court said, in the case of Spears v. Burton, *supra*, "It is true that the presumption of law is, that Bayard was alive until the lapse of five years after his departure had given rise to the presumption, created by the statute, that he was dead. But there is also a presumption of law that the marriage of plaintiff's father and mother was valid, it having been solemnized in due form of law. It was valid unless the former husband was living at that time. But unless he was

shown to be then living, the presumption must be indulged that he was dead; because, otherwise, the second marriage would be held criminal by reason of a presumption, which would be to establish a crime upon a bare assumption." And again: "It would, therefore, be unjust and unreasonable to give force to the presumption that he was living at the time of the second marriage, when subsequent facts tend strongly to show that the presumption of his death, upon which the parties acted, was true in point of fact.

Greenleaf says, speaking of bigamy: "The indictment states the first and second marriages, and alleges that at the time of the second the former husband or wife was alive. The proof of these three facts make out the case on the part of the prosecution. As to the first marriage, it is sufficient to prove that a marriage in fact was celebrated according to the laws of the country in which it took place; and this, even though it were voidable, provided it was not absolutely void." 3 Greenl. Ev., 189, § 204. Upon proof that the first husband was living when the second marriage was had, it was held a good defense; the second marriage being a nullity; and the third, therefore, valid. But the prior marriage must be shown to be absolutely void; for if only voidable, and not avoided before the second marriage, it is no defense. Ib., 190, § 208. It rested upon the defense to disprove the case made out by the state by affirmative proof that Williams was alive when he married the said Maria.

The judgment of the court below was correct, and should be affirmed.

HANDY, J.:

This was an indictment for bigamy, upon which the plaintiff in error was convicted.

On the part of the state, it was in evidence that the accused was married, in due form of law, to one Maria Williams, in Warren county, in this state, on the 1st day of May, 1855; and that he was married, in due form of law, to one Ann Cochran, on the 7th day of July, 1857, the said Maria being alive at the date of the latter marriage.

It was then shown, on the part of the accused, that the said

Maria had been lawfully married in Warren county to one Elijah H. Williams, on the 20th February, 1849.

It was then proved by the state, by the testimony of two witnesses, one the uncle, and the other a member of the family, of said Maria Williams, that in October, 1849, Elijah H. Williams left the neighborhood, and has not since been seen there; that in the winter of that year a report came to the neighborhood that he had been drowned in Old river; that said report was believed and acted upon in his family and that of said Maria; that since the indictment, the witnesses had heard a rumor that said Williams was alive; but it came from a low man, who, from the witnesses' knowledge of his character for truth and veracity, was not worthy of belief on oath; that, with this exception, said Williams has not been seen or heard from since his departure.

Upon this evidence the accused was convicted.

The ground upon which the judgment is alleged to be erroneous is the rule stated in several of the instructions given by the court to the jury, and, among others, in the fifth instruction at the instance of the state, which is as follows: "Although the jury may believe, from the evidence, that the defendant, James A. Gibson, was married to Maria A. Williams on the 1st May, 1855, and within five years next after the departure of her first husband, Elijah Williams, from Warren county, nevertheless, the marriage of said defendant with said Maria Williams is to be considered legal and valid by the jury, unless the proof in the cause satisfies them that Elijah Williams, the first husband, was alive at the time of the marriage of said Gibson with said Maria. The presumption of law as to the continuance of the life of said Elijah Williams after his departure from Warren county will not be sufficient to establish the fact that said Elijah was alive at the time of the marriage of said defendant Gibson with said Maria, in opposition to the presumption of law of his death, arising from such continued absence of said Williams, unheard of for five years.

The position taken in the defense is that the marriage of the accused to Maria Williams was unlawful, because her husband by her former marriage was not proved to be dead; and that

the legal presumption of his death, arising from the fact of his continued absence for five years, unheard of, cannot be applied in a case of criminal prosecution, as evidence of his death, and thereby render the marriage of the accused with Maria Williams legal, in presumption of law, so as to subject him to the crime of bigamy, on account of his subsequent marriage.

The question upon which this position depends is whether the marriage between the accused and Maria Williams was in law valid, under the circumstances in which it was contracted. It appears by the evidence that her former husband had been absent for more than five years at the time, and had not been heard of during that period; that he had been reported to be drowned, and that the report was believed and acted on in the family connection, and Williams has not since made his appearance, and is not shown to have been alive, since his departure. That under such circumstances the marriage was celebrated in due legal form. In point of civil rights, resulting from the marriage, it cannot be doubted that such a marriage would be valid, the former husband not having been proved to be alive after it took place. The right of dower in the wife would have existed, and the offspring of the marriage would have been legitimate and the legal heirs of the father's estate. This results from the presumption of law created by our statute in relation to bigamy, exempting any person from the penalty of the statute who shall contract another marriage after the husband or wife shall have been absent for five successive years, without being known to the person contracting the marriage to be living. Hutch. Code, 977, § 2.

Where the fact of the celebration of the marriage, and in due form of law, is fully proved in such cases, there appears to be no difference as to its validity, between the civil and criminal consequences which may proceed from it. The question in both respects is, whether the parties were competent to contract a legal marriage; and when the presumption of law exists that the former husband is dead, by reason of his absence for five successive years, unheard of, the disability of the party is removed by the legal presumption, and she is competent to con-

tract a new marriage, which is legal and valid to all intents and purposes, until the presumption of death be removed by proof that the absent husband was alive at the time of its celebration. It only becomes illegal, either as to civil rights or criminal consequences, upon the production of such proof.

It is objected that the exemption from punishment of a party marrying in case of absence of a husband, created by the statute, only relieves that party from the penalty, but does not operate to give validity, in presumption of law, to the new marriage, as to the husband of that marriage, so as to bind him to its consequences as a legal marriage; and it is argued that this would be to make her innocence the ground of a presumption that the marriage was legal on his part, and convict him by reason of his subsequent marriage upon a presumption of guilt. But this is an erroneous view of the question. The point of inquiry is, whether his marriage to Maria Williams was legal. The presumption of law is that it is. The effect of the statute is to make it legal as to her, unless her husband were then alive, and the presumption is that he was dead. It must also be presumed to be valid as to him, under the circumstances, for it cannot be presumed to be valid as to one party, and held to be void as to the other. For that would be to render him guilty of adultery for cohabitation with a woman whose marriage with him was, as to her, presumed to be legal and valid, until the contrary was shown, which would be absurd.

The law presumes the marriage to be valid as to him. Spears v. Burton, 31 Miss., 547. And in opposition to that presumption, without evidence destroying it, he cannot be heard to allege that it was illegal, in order to avoid the punishment of his crime in abandoning the duties which he thereby assumed, and contracting marriage with another woman. Nor is he to be permitted to complain that the presumption of the legality of his former marriage is to be used for the purpose of convicting him of the crime of his subsequent marriage. The presumption is one of innocence, which he cannot complain of, because he subsequently committed a crime, in relation to which, the presumption in the former case operates against him.

The instructions of the court are in accordance with these views, and the judgment is correct, and must be affirmed.

SMITH, C. J., dissented from the above opinion.

STATE v. NICHOLS, 39 Miss. R., p. 318.

LIABILITY OF DEPUTY SHERIFF.

Art. 120, p. 123, of Rev. Code, which provides that "if any sheriff or his deputy, coroner, or other officer, shall make a false return on any process, such sheriff, deputy," &c., "shall, for every such offense, be liable to pay the sum of five hundred dollars," &c., to be recovered on motion; and notice given to "such sheriff, deputy," &c., creates a penal offense against the officer committing the act, and renders him individually liable for it; and the sheriff and his sureties are not liable on motion, under that article, for a false return made by his deputy, but the deputy himself is responsible.

The state of Mississippi is as properly a plaintiff in a prosecution or suit instituted in her name as a private individual, and hence is entitled to all the remedies provided by law for plaintiffs against sheriffs or other officers for misconduct in the execution and return of process.

Error to De Soto circuit court. CUSHMAN, J.

T. J. Wharton, attorney general, for the state.

H. W. Walter, for defendant in error.

HANDY, J.:

This was a motion entered against a sheriff, under the provision of the statute, Rev. Code, 123, art. 120, for a false return, made on process in his hands, issued against a party charged with a misdemeanor. It appears by the record that the alleged false return was made by the sheriff's deputy, and the motion thereupon was made against the sheriff and the sureties on his official bond.

Several questions of but little importance are raised. But two points are presented, involving the construction of the statute, which are worthy of consideration. The first of these is, whether the false return having been made by the deputy, the motion should not have been made against him, and does not lie, in such case, against the sheriff.

The preceding section of the statute, art. 115, provides that

"all sheriffs shall be liable for the acts of their deputies, and for money collected by them on executions, whether the same shall have come to the hands of such sheriff or not." This provision appears to have reference to such acts of deputies as, under the existing rules of law, rendered them liable, in the course of official duty, to parties injured thereby, and to render the sheriff liable for all such acts. But the subsequent article, under which this motion was made, proceeds to provide a specific remedy for a false return on process; to make that the subject of a penalty, having reference particularly to the individual making the false return, whether "sheriff or his deputy, coroner, or other officer." This was a new remedy, to which neither the sheriff nor the deputy was liable before the enactment of this provision; and although the sheriff, under the provision of the preceding article, might have been liable for the act of his deputy in making the false return, yet it depends upon the terms of this article whether he would be liable for the same on motion.

The terms of the article appear clearly to indicate that the penalty prescribed was intended to be enforced against the individual who committed the act of violation of official duty. They are, that "if any sheriff, or his deputy, coroner, or other officer, shall make a false return on any process, *such* sheriff, deputy, &c., shall for every such offense be liable to pay the sum of five hundred dollars, &c., to be recovered on motion, and notice given "to *such* sheriff, deputy, &c." This creates a penal offense against the officer committing the act, and renders him individually liable for it. It was doubtless intended to promote individual fidelity on the part of the officer acting, by rendering him liable to the remedy; and being a penal statute, it should not be extended to others not clearly within its scope.

Under this view, the motion was not maintainable, and the judgment is correct.

The other point is, whether the remedy provided extends to process in which the State of Mississippi is a party, and on which a false return has been made.

We perceive nothing in the statute showing that the state is not entitled to the remedy. It is said that the language that one-half of the penalty should go "to the plaintiff in such pro-

cess," and the other half to the county, is not applicable to the state. But the state is as properly a *plaintiff* in a suit or prosecution instituted in her name and in her behalf as is a private individual. She is a party to the suit, and institutes her *complaint*, and the form of the proceeding does not deprive her of the character of a plaintiff.

Judgment affirmed.

FIELDS ET AL. v. STATE, 39 Miss. R., 509.

FORFEITURE OF RECOGNIZANCE.

The order of the court admitting a party to bail on an indictment pending against him, is not properly a part of the record in the matter of recognizance; and a defect in such order must be taken advantage of by plea, and not by demurrer to the *scire facias*.

Error to Tippah circuit court. THOMPSON, J.

G. L. Potter and *O. Davis*, for plaintiffs in error.

T. J. Wharton, attorney general.

HANDY, J.:

This was a *scire facias* issued upon a judgment *nisi*, &c., upon a forfeited recognizance entered into by one John B. Fields, principal, and the plaintiffs in error, his sureties, conditioned for his appearance at the circuit court to answer an indictment for larceny. The *scire facias* appears to be regular and in due form on its face, and shows that the recognizance was entered into before the sheriff of the proper county by the parties; the day on which the accused was bound to appear in court; his default on being duly called, and the failure of his sureties, on being thereto called, to bring him in; and the judgment *nisi*, &c., against them. The sureties appeared and demurred to the *scire facias* on several grounds—1st. That no authority was shown in the record for the taking of the recognizance by the sheriff; 2d. That the recognizance was not taken in pursuance of the order of court, which authorized it only to be entered into by the principal, and not by sureties; 3d. That

the order is void because it does not fix the number of sureties, and does not authorize the sheriff to take it.

In support of these objections, it is insisted that by reference to an order made by the circuit court in the matter of the indictment against John B. Fields, and appearing in the transcript of the record in this case, and in virtue of which this recognizance was taken, it appears that no authority was conferred upon the sheriff to take the recognizance, and that the court had no power to confer such authority under the circumstances of the case.

But the objections are not available upon demurrer to the *scire facias*. The proceedings of the circuit court, in the matter of the indictment, are not properly a part of the record in the matter of the recognizance, and the proceedings had thereupon. The recognizance, and the proceedings had thereon, are collateral to the matter of the indictment, and constitute the proper record in the matter of the recognizance. It is true that it emanates from the charge brought against the defendant; but that does not make it, in law, a part of the record pertaining to the indictment; for frequently the recognizance is the first thing filed in court against a party; and, in all cases, it is the ground of a distinct and substantive responsibility, apart from the charge which gave rise to it. Hence, the order of court admitting a party to bail on an indictment pending against him, is not properly a part of the record in the matter of the recognizance; for that proceeding commences with the recognizance as the first matter of record pertaining to it. If, therefore, a party would avail himself of the insufficiency of the authority under which the recognizance was taken, by way of defense to a *scire facias* upon the judgment of forfeiture, he must do so by plea, presenting the question in a proper manner for consideration. It cannot be reached by demurrer to the *scire facias*, because it is not properly a part of the record of that proceeding.

Without considering the grounds of objection to the regularity of taking the recognizance taken on the part of the plaintiffs in error, we think that the demurrer was properly overruled, and the judgment is affirmed.

CURRY v. STATE, 39 Miss. R., 511.

FORFEITURE OF RECOGNIZANCE.

A recognizance for the party charged with an offense is not void on account of a mistake in it in regard to the time of holding the court to which it is returnable. Rev. Code, 189, art. 201; ib., 690, art. 291; ib., 682, art. 368.

Error to Adams circuit court. CASSIDY, J.

A recognizance was taken by a justice of the peace for the appearance of one McKeevin to answer a charge of forgery. Curry, the plaintiff in error, was surety. The recognizance was conditioned for the appearance of McKeevin "at the next term of the circuit court of Adams county, to be holden at the court-house thereof, in the city of Natchez, *on the first Monday of May next*, 1859."

The time of holding said term was the sixth Monday after the fourth Monday in March, which in that year was the second Monday in May.

A judgment *nisi* having been entered against the cognizors, a *scire facias* was issued thereon. In the *scire facias* the recognizance was described as being condition for the appearance of said McKeevin "at the next term of the circuit court of Adams county, to be holden at the court-house in the city of Natchez, on the first Monday of May, 1859."

Curry moved to quash the recognizance because it was void. This motion being overruled, he pleaded *nul tiel record* to the *scire facias*, upon which plea issue was joined. The district attorney then asked leave to amend the *scire facias*, so as to make its recitals in relation to the recognizance correspond to the facts of the case. The amendment was made, and then the court found the issue on the plea of *nul tiel record* against the plaintiff in error. Curry then sued out this writ of error.

J. S. B. Thacher, for plaintiff in error.

1. The action of the court below in overruling the demurrer to the *scire facias* was erroneous. Recognizances must be made returnable to the term of the court next to occur by law after

the time that they are taken. Butler v. State, 12 S. & M., 470. The high court can now quash the *venire facias*. Ib.

2. The court erred in permitting the district attorney to amend the *scire facias*. The application came too late, after plea of *nul tiel record* and issue thereon. It could be made only upon an application to set aside or quash the writ. Code, 490, art. 70. A *scire facias* can be amended only where some matter may have been omitted which is required to be inserted in or indorsed on the process. Rev. Code, 490, art. 70. The amendment made had the effect of destroying what was before a valid process, though not sustained by the recognizance. The statute of amendments applicable to mere pleadings does not apply to process, because a special statute (Rev. Code, 490, art. 70) regulates amendments to it, and because process is not pleading, and a *scire facias* is process.

3. Under the issue of *nul tiel record*, there was a fatal variance between the recognizance and the *scire facias* unamended; and, when amended, the recognizance being void, the judgment should have been for the defendant and not for the state.

T. J. Wharton, attorney general.

Under the Code, all merely formal statements in such instruments as a recognizance have been abolished. All recognizances taken by any officer in the discharge of his duties, shall be binding on the obligors therein, whether taken in the form presented or not, so that the substantial matters required are set out; they shall only be void, so far as they are conditioned for performance of acts in violation of the law or policy of the state. Rev. Code, 139, art. 201. So it is declared that all recognizances taken in criminal cases, whether they describe the offenses committed or not, shall have the effect to hold the party bound thereby, to answer to such offenses as he may have actually committed, and shall be valid for that purpose until he be discharged by the court. Rev. Code, art. 368; ib., 620, art. 291.

The action of the court in permitting the amendment of the *scire facias*, by the district attorney, was clearly correct. The power to order the amendment remained in the court notwithstanding issue had been joined on the plea of *nul tiel record*,

according to the rules and regulations prescribed in the Revised Code upon the subject of amendments. It was a matter purely within the discretion of the court. The discretion was wisely exerted to make the *scire facias* correspond with the terms and conditions of the recognizance. It did not impose a liability upon the party which he had not incurred by his own act. It conformed to the obligation he took upon himself in the recognizance. It subserved the ends of justice; made the *scire facias* to conform to the recognizance; held the party to his own covenants. It obviated a merely technical objection.

PER CURIAM:

The first error assigned is the refusal of the court to quash the *scire facias*, upon the ground that the recognizance was void.

The recognizance was conditional for the appearance of defendant below "at the next term of the circuit court," to be held, &c., "on the first Monday in May next, 1859."

The *scire facias* recited a recognizance to appear "on the sixth Monday after the fourth Monday in March, being the *second* Monday in May."

The recognizance was not void. See Code, 139, art. 201; Ib., 620, art. 291; Ib., 632, art. 368.

Second and third. The plea of *nul tiel record* was properly overruled *after* the *amendment* of this *scire facias*, which the court possessed the undoubted right to allow, so as to make it conform substantially to the recognizance upon which it was founded.

The *scire facias* is to be regarded as a complaint in the proceeding, as well as the process or writ, by which the defendant is summoned to appear.

Let the judgment be affirmed.

TEAGUE v. STATE, 39 Miss. R., 516.

FORFEITURE OF RECOGNIZANCE.

After the expiration or repeal of a law, no penalty can be enforced nor punishment inflicted for violations of it committed while it was in force, unless some special provision be made for that purpose by statute, and penalties incurred under such repealed

or expired statute must be collected before, and cannot be collected after the repeal or expiration of it.

T. was indicted for selling liquors in violation of a statute which prohibited the sale of vinous and spirituous liquors within a certain locality, in any quantity whatever; he entered into recognizance for his appearance, which he forfeited, and judgment *nisi* was entered against him and his sureties. The act under which he was indicted was then repealed, but the repealing act provided that, "it should not be so construed as to release or discharge from punishment any one who had violated the act intended to be repealed, by selling vinous and spirituous liquors in less quantities than one gallon." *Held*, That this last act must be construed so as to save a prosecution under the first act, although the indictment did not charge the sale in less quantities than a gallon, and that on a trial of that indictment after the date of the repealing act, the state would be held to prove that the sale was in less quantities than a gallon; and, therefore, that the judgment *nisi* should be final.

Error to Yalobusha circuit court.

COTHRAN, J.:

By an act, approved March 2, 1854, the board of police of Yalobusha county were prohibited from granting license to any person to sell vinous and spirituous liquors in the town of Grenada, or at any place within three miles thereof; and it was further enacted, "that it shall not be lawful for any person or persons to sell vinous or spirituous liquors in the town of Grenada, or within three miles of the corporate limits of said town, in any quantity whatsoever;" provided that it might be sold for religious and sacramental purposes, &c.

On the 5th day of May, 1859, the plaintiff in error was indicted for selling in the said town of Grenada, vinous and spirituous liquors, in violation of said statute.

There are two counts in the indictment, and each one charges, in general terms, that the defendant sold, in the said town of Grenada, in violation of said act of March 2, 1854.

On this indictment the defendant was arrested, and thereupon he entered into a recognizance, with security, to appear and answer the same; and, failing to appear, a forfeiture and judgment *nisi* was taken against him and sureties, November 7, 1859. On the judgment *nisi* a *scire facias* issued, returnable to the spring term of the court, 1860. To this *scire facias* there was a demurrer, and also a plea.

In January, 1860, an act was passed to repeal, and which did repeal said act of March 2, 1854; which repealing act contained a proviso excluding from its operation any offender or offenders

who had violated the said act of March 2, 1854, by selling liquors in less quantities than one gallon.

J. W. C. Watson, for plaintiff in error.

It is submitted that this case is not included in the proviso of the repealing act. This proviso could only include cases in which the indictment charged the selling of liquors in less quantities than one gallon, or in which the indictment specifically stated the quantity sold, and which quantity was less than one gallon, as that defendant had sold liquors, to wit: one pint, or three pints, or some other designated quantity which was less than one gallon.

Under this indictment, a party having the right to sell liquor by the gallon, or in greater quantities, but not having the right to sell in less quantities, certainly could not be convicted. In such a case a demurrer to the indictment would be sustained. An indictment for an offense, to be good, must contain those necessary circumstances that concur to ascertain the fact and its nature. 2 Hale P. C., 169. An indictment must charge explicitly all that is essential to constitute the offense. It cannot be aided by intendments; but must positively and explicitly state what the defendant is called upon to answer.

The case, then, not being embraced by the proviso in the repealing act in the premises, the judgment final on the recognizance was entered when there was no law authorizing the proceeding, and when the court had no jurisdiction to proceed farther against the defendant, either on the recognizance or the indictment. It then became the duty of the court to dismiss as well the recognizance as the indictment, even though no plea had been put in defense made by the defendant. Lunning v. State, 9 Ind. R., 309. Where a penalty is incurred under a statute, it must be recovered while the statute is in force; and when the statute is repealed, penalties incurred under it, though before the repeal, cannot be recovered. 1 Stewart, —; Lewis v. Foster, 1 N. H., 61; Eaton v. Graham, 11 Ills., 619. See also, 7 Barr, 173, 174; Stover v. Imwell, 1 Watts, 258; Yeaton et al. v. United States, 5 Cranch, 281.

T. J. Wharton, attorney general.

SMITH, C. J.:

This was a proceeding by *scire facias* upon a forfeited recognizance.

It appears that the plaintiff in error was indicted at the May term of the circuit court of Yalobusha county for vending spirituous liquors, in violation of the act, approved March 2, 1854, in relation to the sale of vinous or spirituous liquors, in the town of Grenada in said county. The said act prohibits the sale of vinous or spirituous liquors in any quantity whatever in the town of Grenada, or within three miles of the limits of the corporation.

The indictment contained two counts, in each of which it is charged, in general terms, that the defendant sold vinous and spirituous liquors in violation of the act, without any averment as to the quantity of the liquors sold, whether in quantities of less or more than one gallon.

The defendant having been arrested under said indictment, entered into a recognizance with surety to appear and answer the same; and, failing to appear, a forfeiture and judgment *nisi* was taken against him and his sureties on the 7th of November, 1859. A *scire facias* was issued upon this judgment, returnable to the May term of the court in 1860.

Subsequent to the entry of the judgment *nisi*, that is, on the 24th of January, 1860, the act above referred to was repealed, but with a proviso declaring that the repealing act "should not be so construed as to release or discharge from prosecution and punishment any offender or offenders who had violated the act intended to be repealed, by selling vinous or spirituous liquors in less quantities than one gallon," &c. Acts 1860, p. 314.

At the return term of the *scire facias* the defendant demurred, and, upon the overruling of the demurrer, he filed his pleas to the *scire facias*, which being adjudged insufficient, a judgment final was against him and his sureties.

It is contended, in support of the exception to the judgment, that, as the indictment does not charge an illegal sale of vinous or spirituous liquors in quantities less than one gallon, the defendant is not included in the proviso of the act repealing the act under which the indictment was found. And as the pend-

ing indictment is not a valid charge for any offense, in respect to which the penalties incurred under the act of the 2d of March, 1854, were intended to be saved by the repealing act, the defendant could not legally be convicted of any offense provided for by any existing law. Hence, as it is assumed that the effect of the repealing act was to absolve the defendant from any penalty incurred under the act repealed, the *scire facias* should have been dismissed.

It appears to be well settled that, after the expiration or repeal of a law, no penalty can be enforced nor punishments inflicted for violations of the law, committed while it was in force, unless some special provision be made for that purpose by statute; and that penalties incurred under a statute must be collected before, and cannot be collected after the repeal of such statute. Yeaton et al. v. United States, 5 Cranch, 281; Stone v. Sumrall, 1 Watts, 258; Lewis v. Foster, 1 N. H. R., 61; 7 Barr, 173; 9 Ind. R., 309.

And it may be conceded that the indictment set out in the record, which charges generally the illegal sale of vinous and spirituous liquors, without specifying the quantity sold, would be invalid as a charge under a statute declaring it to be unlawful for any one to sell such liquors in less quantities than one gallon; but it does not follow, under the circumstances presented by the record, that it is defective, and therefore obnoxious to demurrer.

It is not pretended that the indictment here, when returned into court by the grand jury, was invalid because it did not allege that the quantity of liquor averred to have been sold by the defendant was less than one gallon. Proof of the sale of vinous or spirituous liquors in any quantity whatever by the defendant, in the town of Grenada, or within three miles of the limits of the corporation, would have sustained the indictment. It was, when returned, valid. It was the manifest and expressed intention of the legislature not to relieve against every violation of the act of the 2d March, 1854, but only as to those infractions which had been committed by a sale of liquor in quantities of one gallon and upwards. Hence the only logical or sensible effect which can be ascribed to the repealing act is to ren-

der the general charges in the indictment specific as to the quantity of liquor alleged to have been sold, and to limit the inquiries of the jury and the court to the fact whether the defendant had not been guilty of selling liquors in quantities less than one gallon. Hence if, upon the trial, it should appear that, although the proof might show that the defendant had sold liquor in violation of the act of 1854, unless it should also be proved that he had sold such liquor in less quantities than a gallon, he would be acquitted. On the other hand, if it were proved that the defendant had violated said act by selling liquor in less quantity than one gallon, he should be convicted.

By giving this effect to the repealing act, no possible injury could arise to parties indicted before its adoption, under the act of 1854. But if we assented to the position assumed by counsel that the legal effect of the former act was to render invalid all indictments then pending for violations of the latter, the unmistakable intention of the legislature would be defeated.

Judgment affirmed.

SMITH *v.* STATE, 39 Miss. R., 521.

ASSAULT.

An assault is any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness. Roscoe's Ev., 257. The offer or attempt must be intentional. If it can be collected that there was not a present purpose to do an injury, it is not an assault. Wharton's Am. Cr. Law, 1244.

A mere purpose to commit violence, however plainly declared, if not attended by an effort to carry it into immediate execution, falls short of an actual assault. HANDY, J., *dissented.*

When an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose—the battery is attempted.

Error to Yalobusha circuit court. COTHRAN, J.

F. M. Aldridge, for plaintiff in error.

The instructions asked by the defendant, and refused, are based upon the idea that there must have been an intent to commit a battery. The point upon which the question turns is the intent or purpose of the party charged with the assault. The

court below entertained a different view of the case, and refused to give the third instruction asked for the defendant, "That no threat of words or act can constitute an assault, if the jury believe there was no intention to strike."

The law sustains every instruction asked by the defendant. "The act must amount to attempt; for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault." State v. Davis, 1 Iredell, 128; Wharton Am. Cr. Law, 461.

T. J. Wharton, attorney general.

In support of the action of the court, cited Wharton Am. Cr. Law, 311, 313; State v. Morgan, 3 Iredell, 188, 189.

In the last case Judge Gaston said: "The inquiry was, whether there was a present purpose of doing harm; if not, the acts did not amount to an assault." Again, noticing cases cited by counsel, he said: "But these, and all the cases in our recollection where the doctrine has been held, were cases in which there was a declared intention *not* to do harm *at the time*. The present case is one of a different character. The act was not only apparently a most dangerous assault, but accompanied with a present purpose to do great bodily harm; and the only declaration by which its character is attempted to be changed is, that the assailant was not determined to execute his savage purpose unconditionally, and without a moment's delay. He had commenced the attack, and raised the deadly weapon, and was in the attitude to strike, but suspended the blow to afford the object of his vengeance an opportunity to buy his safety by compliance with the defendant's terms." "To every purpose, both in law and in fact, the attack was begun, and in the pause before its consummation, an arrangement was made which prevented a probable fatal result." He concludes the examination by saying: "Whenever the act is done in *part execution* of a purpose of violence, whether absolute or provisional, it makes no difference as respects the question whether the act be an assault; in both he equally violates the public peace."

"An assault is committed whenever a well-founded appre-

hension of immediate peril from a force already or fully put in motion is created." 1 Bishop Cr. Law, 409. See also 1 Iredell, 125, 375; 11 ib., 475; 9 Ala., 79.

The offense was completed when the prisoner told the witness that he would cut his throat if he did what the law required him to do—execute legal process. That the accused afterwards relented did not atone for the violation of the law, or the injury done to the officer innocently discharging his duty.

SMITH, C. J.:

This was a conviction for an assault, in the circuit court, Yalobusha county.

The defendant pleaded not guilty; and, on the trial, it was proved by the only witness examined in the cause, that he went to defendant's house to levy an execution, and when he arrived there, that he found defendant at the grindstone, grinding his knife. When the witness made known the purpose of his visit, the defendant swore he should not levy the execution, and threatened, if he did, to cut his throat. Witness leaned up against the fence in a careless manner, and defendant walked up to witness in an angry manner. In talking to witness, defendant kept his knife open, speaking in an angry and excited manner, and flourishing his knife, which sometimes passed within six inches of witness' throat. Witness stood motionless, and shamed defendant, and told him that he was a better man than witness, and that defendant put up his knife, but soon took it out again. Witness, for the time, was prevented from making the levy; but defendant's anger subsided after awhile, and he made the levy, and defendant rode off with him to a neighbor's house. Witness did nothing to prevent defendant from striking him, if he desired to do so. Witness did nothing but talk to defendant. Defendant and witness were the only persons present. Defendant did not touch witness, who did not retreat, but stood still.

The errors assigned arise upon the instructions granted, with reference to the foregoing evidence, in behalf of the prosecution, and upon those which were requested by the defendant, and refused by the court.

For the prosecution, the court charged, first, that "If the jury believe, from the evidence, that the defendant, in an angry manner, drew a deadly weapon, and approached Wilson, and, while in reach of him, threatened to do him damage, if he did not desist from doing a lawful act, and that Wilson did desist, for the time, in consequence of such threat, the defendant being armed with and exhibiting such weapon, then the defendant is guilty of an assault;" and second, "That to constitute an assault, it is not necessary that any damage be done, or that any blow be struck."

And refused, in behalf of the defendant, to instruct the jury, first, that "If it was not the intention of the defendant to strike, then no assault was committed;" second, "If it was in the power of the defendant to strike, and he did not strike, nor make any attempt to strike, these are circumstances to be considered by the jury to determine whether there was any intention to strike;" and, third, "No threat of words or act can constitute an assault, if the jury believe there was no intention to strike."

These latter instructions are the converse of those given at the instance of the prosecuting attorney, and, in effect, present the question whether a present purpose or intention to do harm to another is necessary to the constitution of an assault.

An assault is said to be "any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness." Roscoe Ev., 257. The offer or attempt must be intentional; for if, notwithstanding appearances to the contrary, it can be collected that there is not a present purpose to do an injury, it is not an assault. Wharton Am. Crim. Law, 1244, 4th ed. And it is said that a mere purpose to commit violence, however plainly declared, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault. Hence no words of themselves can amount to an assault. Davis v. The State, 1 Wendell, 125; Wharton Am. Crim. Law, 1244. As no words of themselves, or a declared purpose to do an injury to the person of another, unaccompanied with an effort to carry such purpose into immediate effect, amounts to an actual assault, it is not always easy, in practice,

to draw a dividing line between violence threatened and violence begun to be executed. But we think it may safely be laid down, "that when an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun—the battery is attempted."

Tested by these rules, it seems very clear that the rulings of the court were erroneous. The acts or gestures of the defendant were not an evident attempt to commit violence upon the person of Wilson. It appears certain that he did not so regard them, as he leaned carelessly against the fence, offered no resistance, and did not retreat, when it was completely in the power of the defendant to have executed his purpose if he intended to assail him. Under the circumstances in proof before the jury, it was indispensable that they should ascertain what was the intention of the accused. If the proof was clear, or the jury had been satisfied that the accused, at the time, meditated violence upon the person of Wilson, they would have been justified in finding that his acts amounted to an assault. But the instructions excluded from their consideration all of the facts and circumstances in proof before them, and which were relied upon to show that the accused did not intend to commit an injury upon the person of Wilson, and hence that he was not guilty as charged.

Judgment reversed, and cause remanded for a new trial.

HANDY, J., dissenting:

I do not concur in the doctrine stated in the opinion of the court.

I am of opinion that if a party make an *advance* upon another armed with a dangerous weapon, likely to produce great bodily injury, and in a hostile attitude, to all appearance indicating an intention to do the other party great bodily harm, that it is in law an assault, though the party did not *intend* to do the party any bodily injury.

OLIVER v. STATE, 39 Miss. R., 526.

HOMICIDE.

The giving of an instruction philologically inaccurate, but substantially correct, is no ground of error.

An instruction, although it charges the law correctly, being wholly inapplicable to the evidence, should be refused, and it is error in the court to give it.

In cases of resistance and rebellion in a slave, the authority and power of the master is only to be limited by the necessity occasioned by the unlawful resistance to *lawful* authority. If, without necessity, in reducing his rebellious slave to subjection, the master wantonly take his life, he would be guilty of murder or manslaughter, according to the circumstances. Or if the master, by inhuman or brutal treatment, endangering the life or limb of the slave, induce resistance necessary on the part of the slave to save his life or limb, and the master, in the further prosecution of his unlawful conduct, take the life of the slave in such conflict, the master would be guilty of murder.

If the master, in the exercise of lawful authority, in a lawful manner, be resisted by his slave, then the master may use just such force as may be requisite to reduce his slave to obedience, even to the death of the slave, if that become necessary to preserve the master's life, or to maintain his lawful authority.

The giving of an instruction which assumes as proven facts which are not proven, is erroneous.

Error to La Fayette circuit court. THOMPSON, J.

George W. Oliver was indicted in the court below for the murder of his slave, John.

It appears from the evidence that the deceased was a violent, turbulent, and rebellious slave, and that, on the morning of the 14th of March, 1859, he, with several other slaves, was put to shelling corn on a corn-sheller in the corn-crib of Oliver; that in working said corn-sheller, a stick, about five feet long, about two-and-a-half inches in diameter at the large end, and gradually tapering to the other, was used in pushing the ears of corn down into the sheller, and that it was the business of a slave named Dick to use this stick, and that deceased was never allowed to use it on account of his awkwardness. On the morning aforesaid, Dick was as usual using this stick in pushing the ears of corn down, and the deceased was engaged in another department of the shelling. A witness then left the crib, and on his return, about fifteen minutes thereafter, he found the accused, Oliver, in the crib, and he heard him say in a quiet and unexcited tone, "Give up that stick;" and then in a short time he said, violently, "Give up the stick." By this time the witness reached a point where he could see what was going on.

He saw the deceased and accused struggling together for the possession of the stick, both having hold of it. The countenance of the deceased at the time wore a very vicious and savage look. Very soon the accused succeeded in wresting the stick from the hands of the deceased, and he immediately struck deceased on the head with it, and deceased fell, and almost immediately expired. Immediately upon his falling, accused struck in rapid succession two other blows at deceased, but neither of them struck him.

The deceased had been guilty on the day before of an act of disobedience, which was usually punished on the plantation by whipping. It was also proved that the deceased was a very stout and strong man, and the accused a weak and feeble man.

Testimony was introduced on behalf of the accused which tended to show that he was subject to fits of mental derangement; and in the opinion of two of the witnesses—one of whom was a physician—who saw him the day of the killing, he was then not in his right mind, and could not distinguish right from wrong.

The court instructed the jury in behalf of the state as follows:

4. "That manslaughter is the unlawful killing of another in the heat of passion, without malice, in a cruel or unusual manner, and not in necessary self-defense; the law reduces the crime from murder to manslaughter, upon the ground that reason for the time is dethroned and obliterated; and if the jury believe that the defendant killed the deceased at a time when his reason was dethroned by passion, then they will find him guilty of manslaughter only."

7. "That when death ensues from the correction of parent, master, and others having lawful authority, and such correction be considered nothing more than reasonable, the death will be considered accidental; but where, however, the correction exceeds the bounds of due moderation, either in the measure of it, or in the weapon made use of for the purpose, it will be murder or manslaughter, according to the circumstances. If done with a cudgel or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter. But if it is

done with a dangerous weapon, likely to kill or maim, as a pestle or great staff, it will be murder."

8. "That a master has no right to slay or inflict what the law calls great bodily harm upon his slave; and if the slave has reasonable ground to believe that his master is about to slay him, or do him some great bodily harm, he has a legal right to resist his master; and if the master kills the slave in consequence of such resistance, it will be a felonious homicide, and either murder or manslaughter, according to the circumstances."

9. The ninth instruction was to the effect that a master has no lawful right to correct his slave with a pestle or great staff, or handspike; and that the slave has a legal right to resist the attempt of the master to correct him with such instrument as is likely to produce death.

The eleventh and twelfth instructions asked by the defendant, and refused by the court, are as follows:

11. It is the duty of a slave to obey his master in all lawful things, and to submit to the authority of the master to the full extent that the master has lawful authority over him; and it is the privilege and duty of the master to exercise and enforce his authority; and if the slave resist the lawful authority of his master, and a struggle ensues, in which the master strikes a blow which is necessary to meet and overcome the resistance to such lawful authority on the part of the slave, and death ensue from such blow, such homicide is not manslaughter, but murder.

This instruction was modified by the court, as follows: "But that the master, in enforcing his authority, must do it by lawful means and lawful instruments of correction, and not with a staff, or such means as are likely to kill or maim, and also with due and proper caution."

12. "If the jury believe from the evidence that the defendant killed his slave in lawfully attempting to overcome the resistance of the slave to the lawful authority of the defendant, they cannot convict the defendant unless they are satisfied beyond every reasonable doubt that it was not necessary for defendant, in order to meet and overcome such resistance, to strike the blow which produced death, provided such reasonable doubt arises out of the evidence of this case."

This instruction was given, but with the following modification: "But it is for the jury to determine, from the evidence, whether or not the slave killed did make any resistance to the lawful authority of the defendant; and whether, if deceased made resistance, it was, or was not, to save his life, or protect himself from great personal injury."

Exceptions were taken to the instructions given in behalf of the state, and those refused and modified by the court for the defendant.

The defendant was found guilty, and upon his motion for a new trial being overruled, he excepted and sued out this writ of error.

H. A. Barr, for plaintiff in error.

1. The court erred in allowing the state to prove by Cook and Strickland that Brammel told them on the morning of the killing that Oliver had killed his negro; and when they asked him why he did it, he replied, "for nothing"—"that the negro was in the corn-crib, shelling corn, and that he did not seem to work fast enough, and Oliver told him to work faster, and the negro did not do it, and Oliver took the shelling-stick from him and killed him with it." This testimony was clearly inadmissible, and is therefore sufficient grounds to vitiate the verdict and reverse the judgment of the court. 2 Graham & Waterman on New Trials, 613; Penfield v. Carpenter, 13 Johns., 350; Irvine v. Cook, 15 Johns., 239; Marquand v. Webb, 17 Johns., 89; Osgood v. Manhattan, 3 Cow., 612; State v. Allen, 1 Hawks, 6; Anthoine v. Coit, 2 Hall, 40; Craddock v. Craddock, 13 Litt., 77. See also, State v. Engle, 1 Zabriskie, 347; Stephens v. Crawford, 1 Kelly, 574; McMullen v. Mayo, 8 S. & M., 298; Allen v. Parish, 3 Ohio, 107.

The modification to defendant's fourth instruction was clearly erroneous, and calculated to mislead the jury. Dougherty et ux. v. Vanderpool, 35 Miss., 171; Wesley v. State (not yet reported).

The modification by the court to the eleventh instruction was also erroneous, and it lays down the rule that a master must overcome resistance with lawful instruments of correction, and

has no right to use a staff or such means as are likely to kill or maim, in enforcing his authority. If it had been applied and limited to a mere case of correction, where the slave made no resistance, it would have been unobjectionable. But its language is unqualified and unlimited. It covers every imaginable case in which a master may be called upon to enforce his authority. By it the jury were led to understand that it applied to every case of resistance by a slave, no matter how small; and it is not strange that the jury found the defendant guilty of manslaughter; for no matter what they may have thought of the resistance of the slave, they were, in effect, told by the court that the master had no right to overcome it by using the stick which he did use.

Unconditional obedience and submission in all things lawful is the duty of the slave, and authority and power in all things lawful is the right of the master. See State v. Crank, 2 Bail., 66; Jacob v. State, 3 Humph., 513. The right to use the means necessary to maintain authority necessarily grows out of the right of authority itself; for every man has the right to use the means necessary to maintain and enforce the position that he rightfully and legally occupies. Thus, an officer clothed with the authority to arrest a party has a right to use such means as are necessary to complete the arrest; and if resisted when so employed, and the party resisting be killed in the struggle, such homicide is justifiable. Wharton's Am. Cr. Law, 470. And in case of resistance by a slave, the master has the right to employ such means and so much force, to any extent, as will be effectual to subdue him, even to the extent of taking life or limb. Dave v. State, 22 Ala., 23; Mann's case, 2 Dev., 263; Will's case, 1 Dev. & Bat., 121.

The modification to the state's tenth charge enunciates an erroneous rule, which misled the jury. To constitute in law a crime, there must combine a wrongful act and a wrongful intent. 1 Bishop Cr. Law, 253, 254. There can be no criminal intent where the accused is mentally incapable of entertaining it. The jury must find the wrongful act and the wrongful intent before they can declare the accused guilty. But the law requires that, if there be a reasonable doubt as to his guilt, he

shall have the benefit of it, and be acquitted. If the defendant gives evidence of mental incapacity to an extent sufficient to raise a reasonable doubt in the minds of the jury as to whether there was a criminal intent, how can the jury declare that they have no reasonable doubt of the guilt of the accused? The jury must not only be satisfied as to every fact and every intent necessary to constitute the guilt of the accused, but they must entertain no reasonable doubt as to every such fact and intent; for, if they do entertain a reasonable doubt as to any such fact or intent, they cannot say they have no reasonable doubt of the guilt of the accused, because a reasonable doubt as to any element requisite to constitute guilt necessarily creates a reasonable doubt as to the guilt itself. The true rule is, that if the jury, on the whole of the facts on both sides, doubts the guilt of the accused, the benefit of the doubt must be given to him. Commonwealth v. Kimball, 24 Pick., 366; Commonwealth v. Dana, 2 Metcalf, 339, 340.

The defendant was entitled to have the law on this subject correctly declared by the court to the jury. Staten v. State, 30 Miss., 619. A man is not responsible if he insanely believes a certain thing to exist, and acts as he would be justified in doing if what he believed were real. 1 Bishop Cr. Law, 295; McNaughten's case, 10 Cl. F., 200; 8 Scott N. R., 595; Commonwealth v. Rogers, 7 Metcalf, 500.

The mind may be cognizant of the distinction between right and wrong, as regards the act committed, and yet, by reason of some delusion overmastering the will, there may be no criminal intent. In the language of Mr. Erskine, "Reason is not driven from her seat, but distraction sits down upon it, along with her, holds her trembling upon it, and frightens her from her propriety." Roberts v. State, 3 Kelly, 331.

T. J. Wharton, attorney general,

Argued the case elaborately on all the errors assigned, and that the modifications of the instructions were correct, and if not, when taken together, they expounded the law correctly, and the verdict should not be disturbed; and cited Mask v. State, 36 Miss., 77.

HARRIS, J.:

Plaintiff in error was indicted in the court below for the murder of his slave, and convicted of manslaughter. Many errors are assigned here, for reversal, which we do not deem it necessary to notice in the view we take of this case. We shall confine our opinion to the *instructions* complained of.

The first objection urged by the plaintiff in error to the instructions of the court, related to the omission of the qualification, "*and not in necessary self-defense,*" in the latter clause of the sixth instruction given for the state. It is evident that this was the idea intended to be conveyed by the instruction, though, perhaps, for greater certainty and accuracy, it would have been better to repeat the qualification in the last clause of the instruction.

It is further insisted that this instruction *assumes* that the killing was "in a cruel and unusual manner." While, in this respect, the instruction may not be philologically accurate in using the word "when" for "if" in the beginning of the sentence, we yet think it was so intended, and substantially conveys the same idea.

It is still further urged, that this instruction was erroneous because it excluded from the consideration of the jury the question *whether the blow inflicted on the negro slave was, or not, necessary to overcome the resistance of the slave to the lawful authority of the master.* This qualification, we think, was not only material, but relates to the most important inquiry involved in the case.

The seventh instruction given for the state, in relation to the doctrine of "correction" by the master, we think was erroneous, *at least*, because inapplicable to the facts shown in this record. There is no evidence (as the case is now presented by the record) tending to show that the master was intending or attempting to *correct* his slave, *submissive to his authority*, and exceeded the bounds of due moderation in the exercise of that undoubted right.

If it is a case of resistance and rebellion, then the authority and power of the master is only to be limited by the *necessity* occasioned by *unlawful* resistance to lawful authority. If, with-

out necessity, or apparent necessity, in reducing his rebellious slave to subjection, the master wantonly take his life, he would certainly be guilty of murder or manslaughter, according to the circumstances. Or, if the master, by inhuman or brutal treatment, endangering the life or limb of the slave, induce resistance necessary on the part of his slave to save his life or limb, and the master, in the further prosecution of his unlawful conduct, take the life of the slave in such conflict, it is equally certain that the master would be guilty of murder. But if the master, in the exercise of lawful authority, in a lawful manner, be resisted by his slave, then the master may use just such force as may be requisite to reduce his slave to obedience, even to the death of the slave, if that become necessary to preserve the master's life, or to maintain his lawful authority.

Unconditional submission and obedience to the *lawful* commands and authority of the master is the imperative duty of the slave, as well as the undoubted right of the master. And the wisdom and origin of this rule is to be traced to the humane reason that upon its proper observance the happiness and welfare of both races, in that relation, necessarily depend.

The eighth instruction given for the state asserts the proposition, *without qualification*, that the "master has no right to slay, or inflict what the law called great bodily harm upon his slave," &c. In self-defense, or in the exercise of necessary and lawful force in order to secure obedience, he may do both, as we have already seen.

The ninth instruction for the state refers to the doctrine of "*correction*," which we have just said is inapplicable to the facts of this case, as presented in this record.

The modification of the fourth instruction given for the defendant is clearly erroneous, because it assumes as proven, facts which the jury are to examine and determine for themselves.

The modification of the eleventh instruction given for the defendant is also erroneous, because it limits the right of the master, in subduing resistance and rebellion on the part of his slave, to the use of "lawful instruments of *correction*," and prohibits the use of "a staff or such means as are likely to kill or maim," without regard to the circumstances or necessities which

might demand the use of either or all to make his authority effectual.

The modification of the twelfth instruction for the defendant is a clear and correct exposition of the law on the subject to which it refers.

Let the judgment be reversed, cause remanded, and *venire de novo* awarded.

COTHRAN *v.* STATE, 39 Miss. R., 541.

PERJURY.

To support an indictment for perjury, it must be shown that the false swearing was not only intentional, but wilful and corrupt, and was in relation to a material matter in issue before the court where the false swearing was done.

If the court instruct the jury that they must convict if the false swearing was done wilfully, without stating that it must have been done corruptly, it will be error.

Whether the false swearing alleged was material in a former suit, is a matter of law to be judged of by the court, and not a matter of fact to be submitted to the jury.

Error to Pike circuit court. MCNAIR, J.

Elijah Cothran, the plaintiff in error, was indicted in the court below for perjury, alleged to have been committed by him as a witness in a cause tried in the circuit court of Pike county, wherein he was plaintiff, and A. J. Andrews was defendant. It was an action of trespass, to recover damages against Andrews for taking away from Cothran a slave named Wiley, in January, 1860. In said suit Cothran claimed possession of the slave, under an alleged contract of hire for the year 1860, Andrews being the owner of the slave. That case turned upon the question whether Cothran had made a conditional or absolute contract for the hire of said slave.

The first count in the indictment averred, that it was a material inquiry in said trespass-suit, "Whether said A. J. Andrews had hired said slave Wiley to said Elijah Cothran for the year 1860, upon the condition that said Cothran first paid said Andrews for the hire of said slave for the year 1859;" and the perjury alleged was, that Cothran swore "that he did not hire said slave from said A. J. Andrews for the year 1860,

on the condition that he was first to pay said Andrews for the hire of said slave for the year 1859; whereas, in truth and in fact, he, the said Cothran, did hire said slave Wiley from said A. J. Andrews, on the express condition that he was first to pay said Andrews for the hire of said slave for the year 1859."

In the second count it was averred, that it was a material inquiry in said trespass suit, "whether said Elijah Cothran hired the said slave Wiley from said A. J. Andrews for the year 1860;" and that Cothran had testified that he did hire the said slave for the year 1860; when in truth and in fact he did not hire the slave from Andrews for that year.

Cothran pleaded not guilty.

On the trial the trespass-suit of Cothran vs. Andrews was read to the court and jury. It was proven on behalf of the state, that Cothran was duly sworn as a witness in that case, and that as such witness he deposed and testified, "that he had hired a certain negro boy named Wiley from the said A. J. Andrews, for the year 1860; that said hiring was done in the latter part of December, 1859, for the sum of one hundred and fifty-five dollars and twenty-five cents; that the twenty-five cents were added because another person had offered one hundred and fifty-five dollars for the negro, and that Andrews was desirous that he, Cothran, should have the negro, if he would bid over one hundred and fifty-five dollars, which he did by adding twenty-five cents; that no person was present when said contract was made; that it was made at his house. That said hiring was unconditional, but that he was to pay the amount thereof at the end of the year 1860. That he had hired said slave for the year 1859, and had not paid for the same, but that the payment of the hire for 1859 formed no part of the consideration for the hiring for the year 1860."

A. J. Andrews was then introduced, and testified, that Cothran had hired the slave Wiley from him in the year 1859, and in the first or second week of December of that year, Cothran applied to him to hire Wiley for the ensuing year, which witness agreed to do upon the condition that he would pay witness one hundred and forty-five dollars, the amount Cothran owed for the hire of 1859, and which would be due on the 1st of Janu-

ary, 1860. The amount agreed on for the hire of 1860 was one hundred and forty-eight dollars, or one hundred and forty-eight dollars and fifty cents (witness did not recollect which), payable at the end of that year. Amos Greer was present at the making of the contract, and the same was made while they were sitting on a log near Cothran's house. Afterwards, during the Christmas holidays of 1859, the hire for that year still remained unpaid; Cothran informed the witness that he would not be able to pay the whole amount of said hiring for 1859 at the time promised, whereupon witness agreed to take from defendant one-half of the hire of 1859, and wait until the end of 1860 for the balance; to which Cothran agreed, and promised to meet witness at Holmesville on the last day of December, 1859, and pay him. Witness went to Holmesville on that day, but Cothran did not come. Witness then allowed the slave Wiley to remain with Cothran another week, to give him a chance to pay witness the sum last agreed upon, but the defendant failed to do so; whereupon witness, on January 14, 1860, sent for and took away the negro without further consultation with, or notice to, Cothran. Witness admitted that he went with Dennis Dunaway and others to defendant's house some time in December, 1859, but denied that any contract for hiring was made on that day. Witness stated that, by the agreement aforesaid, the contract for hiring was made on that day. Witness stated that, by the agreement aforesaid, the contract of hiring was not complete unless the money was paid as agreed upon.

Witness admitted, on cross-examination, that he had stated to several persons that no person was present at the making of said contract of hiring but Cothran and himself. He did not recollect of ever having admitted it to Fielding Dunaway, at any time in Holmesville. That when he made such admission he had forgotten that Amos Greer was present, but afterwards, recollecting it, he asked Greer about it, who informed him of a good many things connected with said contract which he had forgotten.

Amos Greer, for the state, testified that he was present at Cothran's house in the first or second week in December, 1859, when Andrews and Cothran made a contract for the hire of the

slave Wiley, for the year 1860, and in relation to said contract testified as Andrews had already done. He further stated, that he went to defendant's house with Andrews, but walked down the hill before the conversation about the contract commenced, but returned while it was going on.

John Fisk, for the state, testified that he saw Cothran about the last of December, 1859, or first of January, 1860, trying to borrow money, which he said he was to carry to Holmesville the next day to pay to Andrews for the hire of a slave.

Dennis Dunaway, for the defense, testified that between the 15th and 25th of December, 1859, he offered to Andrews (who was then at witness', house) one hundred and fifty-five dollars for the hire of Wiley for the year 1860; that Andrews said he could not hire him to witness without first seeing Cothran; that thereupon he and witness went by John Cothran's house, and thence he, Andrews, and John Cothran went together to defendant's house. Defendant and Andrews then engaged in a private conversation, which witness did not hear. Witness and Andrews, after taking dinner with defendant, returned together, and Andrews informed him that he could not get the boy; that "he reckoned that he should let the defendant have him," or something to that effect. Amos Greer was not at defendant's that day while witness was there.

John Cothran, for the defense, testified that he went with Andrews and Dunaway to defendant's house; that he was interested in the hire of the negro. He went out in the yard, where defendant and Andrews were talking together about the hire of the negro, and heard nothing said about payment of the hire of 1859 being a condition to the hiring. Witness went away before the contract was concluded. Before witness left he stated to the defendant, in the presence and hearing of Andrews, that whatever the defendant did about the hiring, he, witness, would be satisfied with. In a few days afterwards witness met Andrews, who informed him that he had hired the negro to the defendant for one hundred and fifty-five dollars and twenty-five cents, but said nothing about any condition in the hiring.

Fielding Dunaway testified that some time in the spring of

1860, he and Andrews were conversing in Holmesville about the trespass-suit then pending about the negro Wiley, between him and the defendant, when Andrews said he had heard that John Cothran would swear that he (Cothran) was present and heard the contract between him (Andrews) and defendant for the hire of the slave Wiley for the year 1860; that if John Cothran did swear he was present he would swear a lie, for that nobody was present at the making of the contract but himself and defendant.

John Reid testified that in the latter part of December, 1859, he called on Andrews to hire a negro for the year 1860, when Andrews told him he need not make any offer for Wiley, as he had already offered him to Elijah Cothran.

A. J. Andrews was reintroduced by the state, and testified that neither Dunaway nor John Cothran was present at defendant's house at the time he made the contract for the hiring of Wiley. That he was at defendant's house twice in December, 1859; the first time was when the contract was made; the second visit was for the purpose of ascertaining whether defendant had made threats against the boy Wiley.

The instructions given for the state, and those asked by the defendant and refused, are fully set out in the opinion of the court.

The defendant was convicted, and upon his motion for a new trial being overruled, he excepted, and sued out this writ of error.

D. W. Hurst and *Thos. Hoover*, for plaintiff in error.

T. J. Wharton, attorney general.

HARRIS, J.:

The defendant, Elijah Cothran, was indicted in the court below for perjury, and convicted; on the trial the two first instructions asked by the state were given and excepted to. A motion was made for a new trial and refused, and bill of exceptions taken and allowed, presenting the questions now relied on for error.

The instructions were as follows: 1. "If the jury believe,

from the evidence, that on Wednesday last, 1860, in this court and county, the trial of the suit for damages of *Elijah Cothran* v. *A. J. Andrews*, said Elijah Cothran being sworn, testified that he hired the negro Wiley from A. J. Andrews for the year 1860, and that the contract of hire was absolute and not conditional; that he was, first, to pay Andrews for the hire of the negro for the previous year; and if the jury then believe, upon the evidence of two witnesses, or one witness and corroborating circumstances, that statement untrue, and that Cothran did not hire the negro absolutely, but on condition that he was to pay for the hire of the negro for 1859, then the defendant is guilty of perjury, and the jury should so find; if they further believe, from the evidence, that the testimony of Elijah Cothran was material to the issue in the case between him and Andrews, and that such swearing was wilfully done."

2. "If the jury believe, from the evidence of two witnesses, or one witness and corroborating circumstances, that the defendant was to have the slave for the year 1860, only on the condition precedent that he, Cothran, first paid for the hire of the slave for the year 1859, then, unless the condition was complied with, it did not amount in law to a hiring of the slave; and if the jury believe, from the evidence, that Cothran swore that he hired the slave absolutely, the jury may find the defendant guilty of perjury under the second count of the indictment, if the case is otherwise made out."

These instructions were both erroneous. The first, because it authorizes a conviction if the jury believe that the *swearing* was *wilful*, though not *corrupt*. The instruction should have added the word "corruptly" after the word "wilfully," according to the language of the statute, or used other language indicating to the jury that the *swearing* must be *intentionally false*. The *false swearing* must be *wilful*, both in its *falsity* as well as the act of swearing.

The instruction is further erroneous in submitting to the jury, as a question of fact, the materiality of the defendant's statement on oath as witness in the trial of the case against Andrews. When the record of that suit was produced, and the issue joined between the parties thereto brought before the court and jury

on the trial of the defendant, and his statement on oath as a witness in said cause proven, its *materiality* to support that issue was a question of law for the court, and not a question of fact for the jury.

The second instruction is erroneous because it is founded upon the supposition that there was evidence before the jury that defendant was to have the slave for the year 1860, only on the condition precedent that the defendant first paid *the whole hire of the slave for the year* 1859; and when the evidence shows conclusively that no such contract existed between the defendant and said Andrews, but that if such a contract was ever made, it had been changed and a new contract made.

It is further erroneous in charging the jury that if defendant swore that he hired the slave absolutely, the jury may find him guilty of perjury under the second count of the indictment, *if the case is otherwise made out.*

This latter part of the second charge, even if there had been no objection to the first, wholly omits the important qualifications that they should also believe that the swearing was *wilful and corrupt*, and substitutes therefor this vague and uncertain language, "if the case is otherwise made out."

As the case must be reversed for these errors in the instructions, we forbear from any notice of the other grounds of error which relate to the correctness of the finding of the jury in the court below.

For the errors in the instructions of the court above noticed, let the judgment be reversed, cause remanded, and a *venire de novo* awarded.

KOHLHEIMER v. STATE, 39 Miss. R., 548.

HOMICIDE.

The constitutional rule which declares that "no person shall, for the same offense, be put twice in jeopardy of life or limb for the same offense, applies only to those cases where there has been had either a lawful acquittal or a lawful conviction, under a valid indictment, which is sufficient in law to authorize the court to pronounce its judgment.

If the indictment be so defective in form that a valid judgment could not be pro-

nounced upon it against the defendant, he has not been in jeopardy; and if acquitted, the acquittal would be no bar to another prosecution for the same offense.

An acquittal or conviction (where the penalty has not been inflicted) upon a void proceeding or indictment, will not operate as a bar to the subsequent indictment. *Semble*—That where the penalty has been inflicted it is different.

The verdict of a jury on an indictment for murder, convicting a party of manslaughter, operates as an acquittal of every offense of a higher grade of which he might have been convicted under the indictment.

Error to Chickasaw circuit court. ACKER, J.

Frederick Kohlheimer was indicted in the court below for murder. The caption of the indictment showed that twenty persons, to serve as grand jurors, were summoned by the sheriff, without any writ for that purpose; that they were selected by him in equal numbers from each of the police districts of the county. They were organized, empaneled, and sworn as a grand jury. This body returned the bill of indictment into court. The indictment was found in October, 1857, for a homicide committed in July of the same year. The defendant pleaded not guilty, and was convicted of manslaughter. He moved in arrest of judgment, and his motion being overruled, he made a motion for a new trial, which was overruled, and he excepted and sued out this writ of error.

F. Anderson, for plaintiff in error.

That the plaintiff in error could not be again indicted for murder is clear, for of that charge he has been acquitted. Neither could he be indicted for manslaughter, for the statute of limitations bars the prosecution for that offense. 13 S. & M., 362; Hurt v. State, 25 Miss., 378; Slaughter v. State, 6 Humph., 410; Haynie v. State, 34 Miss., 620.

T. J. Wharton, attorney general,

On the point whether the prisoner should be discharged or remanded for a new indictment, cited Reynolds v. State, 1 Kelly (Ga.) R., 222, and also argued that a second prosecution could be had for manslaughter, and cited Rev. Code, 613, art. 249.

HARRIS, J.:

The plaintiff in error was indicted for murder, and convicted

of manslaughter in the court below, and sentenced to imprisonment in the penitentiary. A motion in arrest of judgment was made, on several grounds; among others, on the ground that the indictment was not found by a legal grand jury, and also that there was no indictment, or issue, on which the plaintiff in error could have been lawfully put upon his trial. This motion was overruled.

Afterwards a motion for a new trial was made, which was also overruled. Exceptions were taken and allowed, and the cause is now brought to this court by writ of error.

Many grounds of error are assigned in the record before us; but it being conceded that the indictment was void, because the record shows that it was found by an illegal body, acting as a grand jury, the question now made before us is, what disposition shall be made of the accused.

It is urged that the finding of the jury is an acquittal of the crime of murder, and he cannot, therefore, be *re-tried* for that crime; that the record shows that the offense of manslaughter is barred by the act of limitations, and he cannot, therefore, be convicted of that offense. It is insisted, then, that he should be discharged by this court, on the ground that there was no valid indictment against him appearing in this record upon which a judgment could be pronounced; that the judgment should have been arrested on the motion of plaintiff in error in the court below; and, in correcting that error, this court must necessarily discharge the accused, as no further prosecution can be maintained against him for this offense.

It will be observed that the sole ground upon which the present application is predicated seems to be the *total nullity or invalidity of the indictment* upon which this prosecution is based. The question, therefore, to be decided *now* is, whether *any*, or what, effect in law is to be given to a criminal prosecution void on its face.

Independent of statutory or constitutional provisions in this state, to which we shall hereafter have occasion to refer, it is an established maxim of the common law, in the administration of criminal justice, constantly recognized by elementary writers and courts of judicature from a very early period down to

the present time, "that a man shall not be brought into danger of his life for one and the same offense more than once." In the case of the United States v. Gilbert, 2 Sumner, 38, Judge Story states the rule, and collects and reviews the authorities, showing that a former conviction or acquittal may be plead in bar of a second indictment for the same offense, even at common law. But the rule thus recognized is always stated with the qualification that "it is intended of a *lawful* acquittal or conviction; for if the acquittal or conviction is not *lawful*, his life was never in jeopardy."[1] 4 Coke, 40–47, case of William Vaux; 2 Hawkins' P. C., book 2, ch. 36, § 15; 2 Hale, ch. 31, 32, p. 243; Regina v. Goddard, 2 Ld. Raym., 922; Armstrong v. Lisle, 1 Salk., 63; People v. Barrett, 1 John., 66; The People v. Carbury, 13 John., 351.

Thus we see that the maxim is imbedded in the very elements of the common law, and has been uniformly construed to present an insurmountable barrier to a second prosecution, where there has been a verdict of acquittal or conviction *regularly had*, upon a *sufficient* indictment. Such was the rule of the common law, and its *interpretation*, at the time it was adopted into the Constitution of the United States as an article of the Bill of Rights, and subsequently into our constitution, as the thirteenth section of our Declaration of Rights. See 3 Greenleaf's Ev., p. 41, § 35, and numerous authorities cited in notes; Wharton's Am. Crim. Law, §§ 541, 551, 573, 587; Bishop's Crim. Law, §§ 663, 666, 673, 677, and authorities cited.

By the constitution of Mississippi (Declaration of Rights, § 13), it is provided that "No person shall, for the same offense, be twice put in jeopardy of life or limb."

The same provision is contained in the Constitution of the United States, and the constitutions of most, if not all the

[1] Wharton's Am. Cr. Law, 551, 587; Gerard v. People, 3 Scam., 363; Com. v. Cook, 6 Serg. & Rawle, 577; Com. v. Clue, 3 Rawle, 498; State v. Garrigues, 1 Hayw., 241; Com. v. Purchase, 2 Pick., 521; State v. Woodruff, 2 Day, 504; State v. Ray, 1 Rice, 1; Com. v. Loud, 3 Metc., 328; Com. v. Keith, 3 Metc., 531; People v. Marsh, 6 Cal., 543; Pritchett v. State, 2 Sneed (Tenn.), 285; People v. McNealy, 17 Cal., 333; Vaux's case, 4 Coke, 44; State v. McGraw, 1 Walk., 208; Com. v. Somerville, 1 Va. Cas., 164; State v. Ray, 1 Rice, 1; Com. v. Clair, 7 Allen, 525; 1 Russell on Crimes, 836; Rex v. Turner, R. & M. C. C., 239; 1 Archbold's Cr. Pr. and Pl., 112; Rex v. Vandercombe, 2 Leach, 708; Wigg's case, 4 Coke, 46; Hite v. State, 9 Yerg., 357; State v. Woodruff, 5 Day, 504; Com. v. Goodenough, Thach. C. C., 132.

states; and the decisions of the courts have constantly recognized the principle, under their written constitutions, so fully established by the common law, that "if the indictment be so defective in form that a *valid judgment* could not be pronounced upon it against the defendant, *he has not been in jeopardy;* and if acquitted, the acquittal would be no bar to another prosecution for the same offense. See Bishop's Crim. Law, §§ 663, 666; 2 Hale P. C., 248; 1 John., 66; 4 Coke, 44; 1 Rice, p. 1; 1 M. & S., 183; 3 Metcalf, 328; 2 St. & Port., 341; 1 Va. Cases, 312.[1]

It is further said by Mr. Bishop, upon the authority of many adjudged cases, "that if sentence be pronounced upon conviction, the defendant will be protected, while the judgment remains unreversed, not because he has ever been in jeopardy, but because of a general and very important principle of the law, that an *erroneous final judgment*, rendered by a competent tribunal having jurisdiction over the subject-matter, is *voidable* only," &c. 1 Bishop, § 663. But in § 666 he says: "Where a man is brought before a tribunal that has no jurisdiction over the offense with which he is charged, or that has its existence by virtue of an unconstitutional act of the legislature, or that is holding a term of court unauthorized by law, *or that for any other reason* has no authority to try him, *he is not in jeopardy*, however far such tribunal may proceed with his case. *And in most, and probably all, of these circumstances, the final judgment, when pronounced, is not 'voidable,'* as mentioned in a previous section (§ 663, just quoted), *but void;* so that his conviction, unreversed, is no more a bar to another prosecution than his acquittal." The State v. Odell, 4 Black. 156; Com. v. Hyde, Thacher Cr. Cases, 112; Com. v. Peters, 12 Metcalf, 387; Com. v. Goddard, 13 Mass. R., 455, 457; The State v. Payne, 4 Miss. R., 376; The State v. McCory, 2 Blackf., 5; Marston v. Jenness, 11 N. H. R., 156; Com. v. Myers, 1 Va. Ca., 188–248; Rector v. The State, 1 Engl., 187; see McGinnis v. The State, 9 Humph., 43; Dunn v. The State, 2 Pike, 229; Rex v. Bowman, 6 Car. & P., 337; The State v. Atkinson, 9 Humph., 677; Com. v. Alderman, 4 Mass. R., 477.

[1] See note (*) *supra*.

Mr. Wharton, in the fourth and revised edition of his work on American criminal law, § 541, says: "A legal acquittal in any court of competent jurisdiction, *if the indictment be good*, will be sufficient to preclude any subsequent proceedings before every other court." See Arch. C. P., 82; 1 Green., 361; 12 Conn. R., 54; 27 Maine R., 266; 5 Rand, 699. At § 573, the constitutional provisions of the federal and state governments are noticed, and the same principle stated. So in 3 Greenleaf's Ev., p. 41, §§ 35, 36.

It seems to be clear, therefore, upon principle, as well as authority, that neither at common law, nor by our constitution, will an acquittal or conviction (where the penalty has not been inflicted) upon a *void* proceeding or indictment operate as a bar to a subsequent indictment for the same offense.

It cannot, therefore, be said that the defendant has been *acquitted of the crime of murder*, by his conviction of manslaughter, upon an indictment which is pronounced in this proceeding to be *void*, because not found by a competent grand-jury, as appears by this record, unless there be some special provision in our statute changing the common law rule on this subject.

We are referred to the case of Heward v. The State, 13 S. & M., 262, and Hurt v. The State, 25 Miss. R., 378, as establishing a different rule.

The first case cited only has reference to the statute of limitations in relation to manslaughter, holding that where it appears from the record that the statute has interposed its bar, that the defendant would be entitled to his discharge, under the provisions of Hutch. Code, 1004.

The case of Hurt v. The State,[1] on the point we are now called to consider, cannot be deemed an authority for the position that an acquittal under a *void* indictment, *void on the face of the record*, is in law a bar to another indictment for the same offense. There is nothing in the report of the case which shows that the point here presented was either discussed by counsel or decided by the court. The *acquittal* of murder seems to have been taken as indisputable in that case, for the reason that the

[1] *Supra.*

indictment was considered not *absolutely* void, but merely "*voidable.*"

The language employed in delivering the opinion of the court shows that the point now under consideration was not made.

It was insisted for the defendant (p. 380) that the verdict of manslaughter is an acquittal "of the charge of murder, and as the statute of limitations will bar another indictment for *manslaughter* merely, the prisoner should be discharged."

The attorney general replied, "that the *reversal of the judgment*, on the verdict of manslaughter, annuls the whole proceedings upon the trial below, as well for as against the prisoner; and that the indictment having been *avoided by the pleas* in *abatement*, he can be again indicted for the crime of murder."

The attorney general does not present the point now under consideration—that the indictment and whole proceedings are *void;* but urges that the *reversal of the judgment* of the court below, overruling the defendant's plea in abatement, showing the illegal organization of the grand jury, annulled the whole proceeding below, both as to the acquittal of murder and the conviction for manslaughter. He did not assume that the whole proceeding was *void*, but *reversed.*

What does the court say immediately following this statement made by itself of the respective positions of the counsel for the state and for the accused? "A verdict of a jury, finding a party put upon his trial for murder guilty of manslaughter in the third degree, must of necessity operate as an acquittal of every crime of a higher grade, *of which he might have been convicted* under the indictment upon which the issue was made. If, then, on the *face of the record* it appears that the indictment is *void*, consequently that no legal conviction could be had upon it by the rule established by the court in Hurt's case, there could be no legal *acquittal* or conviction.

The court then proceeds to discuss the effect of the reversal of the conviction for manslaughter, and to show that it only annulled *that* judgment; that, in effect, there were two verdicts and two judgments in the court below—one a verdict and judgment of acquittal of the crime of murder, from which no writ

of error was, or could be, prosecuted under our system; the other a verdict of guilty of manslaughter, and judgment thereon, from which the defendant alone could prosecute a writ of error. "The judgment of reversal could extend only to such judgments and matters as the writ of error brought to our consideration."

"A judgment acquitting the party of murder not being one which could be embraced in his writ of error, for the same reason could not be embraced in our judgment." Hence it stands unaffected by our action, as the judgment of the court below on the charge of murder. It may be true that no formal judgment of acquittal was entered; but we hold that the sentence of the court upon the verdict of manslaughter was of itself a complete acquittal of all higher crimes *of which the party might have been convicted under the indictment.*

And for this, the court cites the case of Slaughter v. The State, 6 Humph., 410, where that court, relying upon the previous case of The State v. Norrell, 2 Yerger, 33, state the rule to be "that a verdict of acquittal *upon a good indictment* is a bar, under our constitution, to any subsequent trial for an offense affecting life or limb, although no judgment was ever entered."

In further discussing the case of Hurt v. The State, it is obvious that the court intended to confine itself to the indictments which, on the record, were at least *prima facie* legal, *though voidable* upon plea in abatement, as was the case before it. The case of a *void* indictment is expressly pretermitted by the language used. On this subject the court says: "It is not necessary that we should go into an examination of the principles involved in the other question made by the attorney general. It may be admitted, for the sake of the argument, that the indictment was *voidable;* and still, under the record, the prisoner would be entitled to his discharge. The indictment purports to have been found by a grand jury organized by the court. The record shows that the prisoner was arraigned and regularly tried upon the charge therein contained, and that he was acquitted of the charge of murder upon the facts and testimony introduced before the jury. The statute is decisive of *the question*, and was no doubt enacted to relieve against

such cases. It is in these words, to wit: "No person shall be held to answer on *a second indictment* for any offense of which he has been acquitted by the jury upon the facts and merits on a former trial; but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offense, notwithstanding any defects in the form or the substance of the indictment on which he has been acquitted." See Rev. Code of 1857, p. 573, arts. 4, 5, 6, 7. How. & Hutch., p. 690, § 5; Id. 725, § 20.

"The statute," says the court, "is decisive of *the question*." What "question?" Whether a prisoner, "arraigned and regularly tried," and "acquitted of the charge of murder, upon the facts and testimony introduced before the jury," under a "*voidable* indictment, was entitled to be discharged, when the judgment for manslaughter had been arrested, and that offense barred by the statute of limitations." "In *such case*," the court says, "the party has gone through the legal form of a trial, and has, by it, established his innocence; and hence the wisdom of the statute in providing *for such cases*"—"cases" where there was *an indictment*, however irregular or "*voidable*." But certainly neither this decision, nor the act of the legislature just quoted, were ever designed to apply to a case where, *in law*, there was no grand jury, *no* indictment, *no* accusation, *no* power or authority to arrest, arraign, try, convict or acquit, and hence no "jeopardy of life or limb." Both the decision and the statute had reference to that class of cases where the defendant, waiving—perhaps scorning—the advantage of either technical or even substantial defects in the record or indictment, chooses to rely on the *facts and merits* of his case for acquittal, rather than avail himself of the *demerits* of the officers of the law. In such case, *however erroneous or voidable* might be the proceedings against him, justice and good faith sanction the rule and the statute which seals his acquittal. It has relation to "*defects in the form or substance of the indictment*," not to a *void* proceeding. The defendant may waive *erroneous* or *voidable* proceedings, but it is neither in the power of the defendant, nor of the court, nor even of the legislature itself, to give validity to a void prosecution, or a void judgment, upon a void indictment.

These principles, as well as this construction of the act in question, are directly sanctioned by the opinion of this court in Newcomb v. The State, 37 Miss. R., 383.

It is there held, that Art. 7, p. 573, of the Rev. Code, which provides that all objections, either to the form or substance of an indictment, shall be made before verdict, applies to those cases only where the defect is of such a character that the accused may waive it, either expressly or by his silence.

It is there further held, that a defendant cannot waive objections to a void indictment; that the right secured to him by our constitution, "to demand the nature and cause of the accusation against him," cannot be waived or surrendered by him.

The judgment below must be reversed, and defendant be ordered to appear at the next term of the circuit court of Pontotoc county, to answer to an indictment for the offense originally charged against him, according to his recognizance and bond.

MUNFORD (A SLAVE) *v.* STATE, 39 Miss. R., 558.

HOMICIDE.

An acquittal on an indictment for a greater offense, is a bar to a subsequent indictment for a less offense included in the greater, only where under the indictment for the greater offense the prisoner could have been legally convicted of the less.

To enable a party relying on a plea of former acquittal to avail himself of this defense, it must appear that he could have been convicted under the first indictment for the offense charged in the second, by the same testimony.

M., a slave, was indicted for the murder of A., and was convicted of manslaughter. The judgment was arrested, because the indictment did not show whether the deceased was a white man or a negro. He was afterward indicted for the manslaughter of A., a white man. *Held*, That the former trial and judgment was no bar to the second indictment, as the first indictment for murder was legally insufficient to support a conviction for manslaughter.

Error to Carroll circuit court. COTHRAN, J.

R. B. Mayes, for the plaintiff in error.

1. The term *offense*, as used in a legal sense, is relative, and is applied indiscriminately to any violation of criminal law. In its most extended sense it is nearly synonymous with crime,

and it is with sense that we have to deal with it. Bouv. Law Dic., tit. "Offense." It is never applied to any specific violation of law. It does not of itself mean murder, nor manslaughter, nor assault, nor yet battery. But it is the *act* of violating the law, the *fact* by which the law was violated—the *corpus delicti;* as in murder or manslaughter it means the *act* of killing; in assault, the *attempt to do another a personal injury;* in battery, the *actual beating* of another. This is necessarily so, for we find an *offense* often divided into *degrees*, and each degree having a different punishment attached. This is well shown by authority. In the case of Rex v. Bandicombe et al., this point is held in substance. The defendants were first indicted for burglary, in breaking and entering a dwelling-house and *stealing*. The second indictment charged them with breaking and entering with *intent to steal*, and they pleaded *autre fois acquit*. The plea was overruled on demurrer, which was argued before all the judges of England, on the ground that the *offenses* were not the same; Mr. Justice Buller, who delivered the opinion of the court, saying, "It is quite clear that, at the time the felony was committed, there was only *one act done*, namely, the breaking of the dwelling-house. But this fact alone will not decide this case, for burglary is of two sorts: 1st, breaking and entering a dwelling-house in the night-time and *stealing goods therein;* 2d, breaking and entering a dwelling-house in the night-time with *intent to commit a felony*, although the meditated felony be not, in fact, committed. The circumstance of *breaking* and *entering* the house is common and essential to both the species of this offense, but it does not of itself constitute the crime in either; for it is necessary, to the completion of burglary, "that there should not only be a *breaking* and *entering*, but the breaking and entering must be accompanied with a felony committed or intended to be committed." Russ. on Cr., 829. The deduction to be drawn is, that the breaking, entering and stealing form *one* act; and the breaking and entering *with intent to steal* form another, and that each is a separate and distinct offense.

In Benham's case, the defendant was indicted for having in his possession a forged bank-note of the Troy Bank, with intent

to utter and pass the same, and with intent to defraud the bank. To this he pleaded a former conviction for having in his possession, at the same time and place, a bank-note of the Mechanics' Bank, with the same intention. In deciding the plea, the court says: "He has been tried for having one of them in his possession, and convicted; and the question now is, whether he can be again tried and convicted for possessing each of the other notes of the different banks which he had at that time; in other words, is the possession of each note holden at one and the same time, a *distinct offense*, and punishable as a distinct crime? * * * The offense consisted in uttering and putting them off." "It has been decided that a person indicted for stealing nine one-pound notes may be convicted upon proof of stealing only one. Rex v. Johnson, 3 M. & Selw., 539, 548; Rex v. Clark, 1 Brod. & Bing., 437. There the substance of the offense is stealing notes; here the substance of the offense is having in possession counterfeit notes. The number may add to the evidence of guilt, but not to the number of offenses. In action for the penalty for insuring tickets in a lottery, where ten tickets were insured at one and the same time, Lord Kenyon held, that but one penalty could be recovered." The State v. Benham, 7 Conn., 414. In Barrett's case, Kent, C. J., says: "The indictment does not contain a *venue* in that part of it which avers that the defendant made a *fraudulent pretence*, in pursuance of the conspiracy previously and at another day formed. This is a material allegation, and it required a *venue*, for the *act done* in pursuance of the conspiracy was the *gist* of the charge." People v. Barrett, 1 Johns., 75.

In Sheppard's case it is held, that "the law is well settled that, upon an indictment for petit treason—in a servant's killing his master, for example—an acquittal or conviction of murder for the same killing is a good bar." 2 Hale P. C., 246. So, if a man be acquitted upon an indictment for murder, it is a good plea to an indictment for manslaughter of the same person; or *e converso*, if he be indicted for manslaughter, and be acquitted, he shall not be indicted for the same death for murder, for they differ only in degree, and the *fact* is the same. Holcomb's case, 4 Co. R., 46, *b*. So, if a

person be on trial for a theft, and by the proof it should appear that the theft was accompanied with such facts as would constitute robbery, an acquittal or conviction of the larceny would be a bar to an indictment for robbery. The same fact of stealing is in both cases the subject of inquiry, and in both cases essential. The State v. Sheppard, 7 Conn., 55. See also, State v. Nichols, 8 Conn., 496; Commonwealth v. Roby, 12 Pick., 496; Commonwealth v. Kinney, 2 Va. Cases, 139; Fiddler v. State, 7 Humph., 508; McGowan v. People, 17 Wend., 386; Roberts v. State, 14 Ga. R., 8. See also, 7 Humph., 508; Thach., 206, 207; Rocco v. State, 37 Miss., 357.

"It is to be observed, that the plea of former acquittal or conviction must be upon a prosecution for the same identical act and crime." 4 Black. Com., 336. That the acts are the same is necessarily the case; that the crime is the same, Blackstone thus declares: "The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt which divide the *offense* into manslaughter and murder." 4 Black. Com., 190. These authorities clearly illustrate that, in all cases, it is *the act* which comprises the *offense*, and not the degree of guilt incurred. The *offense* charged against Munford is the *killing* of Ashley—is the *corpus delicti*.

2. The rules applicable to the question whether Munford was legally acquitted, and whether the acquittal will bar the subsequent indictment, are very numerous. Under our law, as at present framed, in the case of a negro killing a white man, the state, at its option, indict for murder or manslaughter, or for both. In the present case, the state elected first to indict solely for murder. The indictment was so framed that the question of manslaughter could not be inquired of by the jury. Upon that indictment a verdict of acquittal was rendered. See Hurt v. State, 25 Miss., 378; Swinney v. State, 8 S. & M., 576. It is now sought to try him for the manslaughter of the same person. This can only be done, provided "that, owing to some defect or circumstance, no valid final judgment could have been rendered against the prisoner" if he had been convicted on the first indictment. Bishop Cr. Law, 662, 663; Russ. on Cr., 835; People v. Barrett, 1 Johns., 75. The rule is, that "if the

prisoner *could* have been legally convicted on the first indictment, upon any evidence that *might* have been legally adduced, his acquittal on that indictment may be successfully pleaded to a second indictment, and it is immaterial whether the proper evidence were adduced on the trial of the first indictment or not." Wharton's Am. Cr. Law, 252; Rex v. Embden, 9 East, 214; People v. McGowan, 17 Wend., 386; 1 Archb. Cr. Pr., 112; 1 Russ. on Crimes, 832, 833.

Another rule is, "We may observe that the great general rule upon this part of the subject is, that the previous indictment must have been one upon which the defendant could legally have been convicted; upon which his life or liberty was not merely in imaginary, but in actual danger, and, consequently, in which there was no material error." 1 Arch. Cr. Pr., 112. Here we find clearly and distinctly enunciated what, in all cases of *autre fois acquit*, should be steadily kept in mind, and what would form a safe criterion in every case to judge of their correctness, to wit: Was the prisoner's life in danger on the first trial? If so, it is good. If not, it is bad. His life *was* in danger, and there was no material error in the proceedings, which is sufficient. Russ. on Cr., 834. "Unless the first indictment were such as the prisoner might have been convicted upon, by proof of the facts contained in the second indictment, an acquittal on the first can be no bar to the second." Rex v. Vandercomb & Abbott; Russ. on Crimes, 830; Roberts v. State, 14 Ga. R., 8.

On an indictment for murder or manslaughter, but *one fact* is necessary to be proven—the killing. When this is proven, the state has established a *prima facie* case of murder. East P. C. 224; Mitchell v. State, 5 Yerg., 340. It then devolves on the defendant to show circumstances in mitigation, extenuation, or exculpation. When the state has proven the one fact common to murder and manslaughter, a *prima facie* case is made out, and the defendant's life is in jeopardy; when the state has proved the one fact in burglary common to both these species of offense—the breaking and entering—it has not made out a *prima facie* case, and the defendant's life is not in jeopardy; the prosecution has to go farther, and prove one of two separate

and distinct facts, the proof of one of which does not tend to establish the other; so the court held in this case. In murder, the fact of the killing being proved, the law presumes malice till the contrary appear; in burglary, the fact of the breaking and entering being proved, the law *does not* presume a felony, but the felony must be *proved*, and there being *two kinds of felonies* susceptible of proof, the establishment of the one does not establish the other. On an indictment for murder, if the prosecution proves the fact of the killing, and at the same time proves mitigating circumstances which reduces the offense to manslaughter, the court would not, upon motion, exclude the testimony; for the jury are the judges of the facts, and they may disbelieve the mitigating circumstances. The court is only the judge of whether or not the prosecution has made out a case of guilt *in law*, and the jury is to determine whether it has been made out *in fact*. In burglary, on an indictment for the breaking, &c., and *stealing*, if only an *intent to steal* is shown, the prosecution has *not* made out its case in law, and therefore the testimony would be excluded, and *therefore they could not be convicted* upon that indictment.

"If a prisoner *could* have been legally convicted upon an indictment on any evidence that *might have been* adduced, his acquittal upon that indictment may be successfully pleaded to a second indictment, and it is immaterial whether the proper evidence was adduced at the first trial or not." State v. Nichols, 8 Conn., 496; State v. Shepherd, 7 Conn., 55; Roberts v. State, 14 Ga., 8; Fiddler v. State, 7 Humph., 508.

T. J. Wharton, attorney general.

HARRIS, J.:

The plaintiff in error was indicted in the circuit court of Carroll county for the murder of one Valentine Ashley, not alleging that he was a white man. Upon this indictment a verdict of guilty of *manslaughter* was rendered, and upon the motion of the plaintiff in error, this judgment was arrested in the court below, upon the ground that the record did not show whether the offense found was the manslaughter of a slave, which is not a capital offense, or the manslaughter of a white man, which is

punished capitally by our laws. The judgment was, therefore, arrested, indictment quashed, and the prisoner held to answer a new indictment.

At the next term of the court, the prisoner was indicted for the manslaughter of Valentine Ashley, *a white man;* and in his defense thereto, relied on the plea of a former acquittal for the same offense, setting out specially all the proceedings had on the former trial. To these pleas the district attorney demurred, the demurrer was sustained, and a jury and a verdict of guilty, and judgment.

The action of the court in sustaining the demurrer to these pleas of a former acquittal is the error assigned here.

Ordinarily an acquittal on an indictment for a greater offense is a bar to a subsequent indictment for a minor offense included in the former, wherever, under the indictment for the greater offense, the defendant could have been convicted of the less. An acquittal on an indictment for a minor offense is generally no bar to a subsequent indictment for the greater. Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea of former acquittal is generally a good bar.

To enable the party relying on the plea of former acquittal to avail himself of this defense, it must appear that he *could have been convicted*, under the first indictment, for the offense charged in the second.

In the case before us, no conviction of manslaughter could have been legal under the first indictment. The indictment failing to show whether the deceased was a white man or a slave, the court could not know what judgment to pronounce. The manslaughter of a slave by a slave, in our law, is not a capital offense, while the manslaughter of a white man by a slave is made capital by statute.

The defendant was not in jeopardy for the offense with which he is now charged, and cannot avail himself of that defense.

Judgment affirmed.

GEORGE (A SLAVE) *v.* STATE, 39 Miss. R., 570.

HOMICIDE.

In point of law there can be no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender. And if the joinder of more than one distinct felony in the same indictment be objected to before plea, the court should quash the indictment. But this is a matter within the discretion of the court, and not necessarily a right of the accused. *Semble*, that such objection cannot be made after plea of not guilty.

By the express terms of Rev. Code, 497, art. 126, a person who is an alien is disqualified to act as a juror in any case; yet if his disability was not made known to the court, and the defendant accepted him at the time, knowing the existence of such disability, it will be presumed that all objections were waived; and the juror having sat in the case will not vitiate the verdict. 2 Bay, 153; 2 N. & McC., 261; 4 Dall., 353.

Where there is a conflict in the testimony of two witnesses, it is within the province of the jury to decide which of them is entitled to credit.

Error to Bolivar circuit court. YERGER, J.

The plaintiff in error and one Josephine, both slaves, and belonging to La Fayette Jones, were jointly indicted for murdering, by poisoning, Lelia Virginia Jones, who, at the time of her death, was about eighteen months old. There were two counts in the indictment; the first charging both parties as principals, the second charging Josephine as principal, and George as accessory before the fact.

On motion of the state, a severance in the trial was granted; and George, having been put on his trial, moved the court to quash the indictment on account of misjoinder of the two counts; which being overruled, he moved the court to compel the district attorney to elect on which of the counts he would proceed to try him. This motion was also overruled.

On the trial it was proven for the state by La Fayette Jones that he had owned George about twelve years; that for the last two or three years he had been an invalid and had not worked in the field, but had done little jobs about the house and yard; that on the Sunday last preceding the poisoning he had ordered his overseer to direct George to go to laying off corn-rows on the next morning; but George, being sick next morning, was not put to work as directed; that on the 27th of February, 1857, about noon, he and his wife and little daughter, Lelia Virginia Jones, and his son and a Mr. Forbes, ate dinner at his res-

idence; that he (witness) and Mrs. Jones and Lelia Virginia Jones drank tea; that Lelia was taken sick at the table, and, in ten or fifteen minutes after dinner, he and his wife were taken violently ill, all of them vomiting a great deal; that he had burning and retching about the stomach, and all three of them high nervous excitement; his son and Forbes did not drink of the tea, and were not sick; that Lelia kept growing worse, and died that night, about ten o'clock, from the attack, at his residence in Bolivar county, state of Mississippi.

On cross-examination, he stated that George had always been a good and obedient and humane servant; that he had purchased said Josephine but a few weeks previously, in New Orleans; that she seemed a good deal dissatisfied about the purchase; she was the cook who prepared dinner on the day of the poisoning, and had been acting in that capacity for about a week; that on that morning she had been impudent to his wife, for which he had given her a slight whipping, and the overseer had also whipped her for the same offense.

Mrs. Jones, for the state, testified in regard to the poisoning and its symptoms the same as her husband. She stated that she had taken only a few sups of the tea, and that her little daughter Lelia had drank a whole cup-full. She stated that tea was not usually prepared for dinner, but only when it was specially ordered, and that she did not remember having ordered tea for dinner on that day. She also stated that she had gone to the smoke-house with Josephine to get out dinner, and Josephine did not then appear to be in a bad humor; but that after the whipping in the morning, she was morose and sulky; that in the last two or three days before the poisoning, Josephine's manner had changed.

Both the above witnesses stated that it was no part of George's business to be in and about the kitchen, and neither of them remembered to have seen him there on the day of the poisoning. Mr. Jones stated he was engaged at work fixing up the palings around the yard.

John Rhodes, for the state, testified that he was overseer for La Fayette Jones in 1857; that on Sunday previous to the poisoning he told George to go to laying off corn-rows next

morning; that his master had so ordered. George said he was sick and not able to work; that his master was tighter on him than ever before, and that witness was the cause of it. George did not refuse to lay off the corn-rows, but grumbled, not more than negroes who had been indulged a good deal usually do. George was sick next morning—had fever—and was not put to laying off corn-rows, and never had been put to that work. George was a negro of good character for fidelity and obedience.

Dixon, for the state, testified that he was overseer for L. Jones in 1854 and 1855. In the year 1854, George told witness he had found a vial with some white stuff in it, and asked witness what he should do with it. George, while under witness' charge, was of good character for truth, fidelity and obedience.

Dr. Mason, for the state. Visited Jones and wife and the deceased professionally on the evening of the poisoning. He described the symptoms of the attack under which they were laboring, and stated that they were such as were commonly produced by arsenic, and that the child died from the effects of it that evening, soon after his arrival there.

The state then introduced Josephine, who was jointly indicted with George, as a witness. The defendant objected on account of her incompetency. The objection was overruled, and the defendant excepted. She then testified that about a week before the poisoning she went, about nine or ten o'clock at night, to George's cabin to carry him his supper. George said he was sick, and that the overseer had ordered him to lay off corn-rows next morning, and that he could not do it; that his master was getting tighter on him than he had ever been, and that the overseer was the cause of it; that it was his master's day now, but it would be his after awhile; that he was going to take care of number one. He spoke in his usual tone of voice. George then got up and went to his chest, without saying what he wanted. After looking about in his chest some time, he took out a vial and showed it to witness, and said it was ratsbane or strychnine, he did not know which, and that he would have use for it after a while. Witness could read a little, and seeing a small part of a label on the vial, endeavored to read it, and thought

she could make out "arsenic." George put it back in the chest. There was a little negro girl called Eliza in the cabin at the time, but does not know in what part of the cabin she was; thinks she was at the fireplace cooking her supper. On the day of the poisoning, George came into the kitchen a short time before dinner. The dishes were on a table to the right of the stove. George said he wanted to take some medicine, and asked for a spoon. He reached up and got one. After a short time he reached up as if to put something on the plate or joist of the kitchen, and said: "Don't let anybody disturb this." Witness had her back to George most of the time, and did not see him put anything into any of the dishes or vessels. Tea had not then been made. There was a teakettle on the stove, and a teapot on the table with the dishes. George was about five feet from the stove, and near the table on which the dishes were placed. When George asked for the spoon she told him he knew where to get it, and not to bother her. There was water in the kettle, but none in the teapot. Maria (a small negro girl) afterwards poured water on the tea in the teapot. After the poisoning, Mr. Rhodes, the overseer, arrested her and tied her to a bed in a room between the dining-room and parlor. There is a door with a broken pane of glass in it; and shortly after her arrest George came to the door and spoke to her through the broken pane, and asked her if she had removed that bottle from where he had put it. She told him she had not removed it, and knew nothing about it. She asked him if he had put anything into the dinner. He said, "Not enough to hurt," and then said he would go and destroy the vial. Shortly afterwards he came round to the window at the other end of the room, and told her he had thrown the vial into the fire and destroyed it, and said: "For God's sake, say nothing about it." The window-sash was pushed up a little way, and a book placed under it, and witness saw George when he came there. She had been sitting on a chair, but rose up when he came.

Cross-examined.—After the poisoning Mrs. Jones directed her to bring in a tub of warm water, which she did, and then, by direction of Mrs. Jones, went into the ironing-room to iron a dress. She was there when arrested. Before dinner, when

going to Mary's room for dishes, she saw one of her handkerchiefs there, which seemed to have been used in straining starch. She took the handkerchief to the kitchen, and shortly before dinner, washed it and hung it on a bush to dry. She had not, to the best of her recollection, told Judge McGuire or Dr. Mason, on the evening of the day on which the poisoning took place, "that she had seen George put something in the teapot and stir it up." She was confident she had not told them so. She said when she saw the vial at George's cabin she thought of no harm. She had never told Dr. Mason that she and George had conspired to poison Jones' family.

Eliza, a slave, for the defense, testified that she was in George's cabin cooking her supper when Josephine came in; this was the night before the poisoning. Some time after Josephine came, George went to his chest, as he said, to look for some tobacco. After rummaging about for some time, he picked up a vial and said to Josephine, "Here is some stuff, either ratsbane or strychnine." Josephine said, "Let me look at it, Uncle George." She took it and tried to spell out some name on a paper of the vial, and said it was arsenic, and handed it back to Uncle George, who said he did not want it, and had no use for such stuff. Josephine then asked him for it, and took it and put it in her pocket. George said he had found it in the road, and had had it for a long time.

Cross-examined.—She did not sleep in the cabin that night; she came there to cook her supper. George looked in the chest some time for the tobacco; he came from the chest with the vial in his hand. Witness had her back to George when he first went to the chest, but had turned round when she saw him with the vial; she was near enough to hear distinctly what was said. Heard George say to Josephine that his master was getting tighter on him than he had been; that Mr. Rhodes was the cause of it. He did not appear to be angry. Said he was not able to lay off corn-rows. Did not hear him say that his master had had his day, and he would have his, nor that he would take care of number one. Had heard George the Sunday night before speak of his master wanting him to lay off corn-rows, and that he was getting too tight on him. She stayed in the cabin

about an hour that night. George and Josephine had been sleeping in the cabin about two weeks.

Maria, a slave, about eleven years of age, for the defense, testified that on the day of the poisoning, shortly before dinner, she went into the kitchen and saw Josephine straining something through a handkerchief into the teapot; the handkerchief was wet. She had one hand in the pot, and was squeezing something. Josephine afterwards washed the handkerchief by pouring water from a gourd, and then hung it on a bush behind the kitchen. Witness told this on the night of the poisoning to Dr. Mason, who told her to go and get the handkerchief, which she did, and gave it to Dr. Mason or Judge McGuire. When witness first went into the kitchen, Josephine told her to go and ask her mistress if she wanted tea for dinner. Witness went, and came back and told Josephine that her mistress said make tea. It was on her second going that she saw Josephine washing the handkerchief. She went with Josephine to get the tea. Saw her hang out the handkerchief when she went back to tell Josephine to make tea. When sent by Dr. Mason, she found the handkerchief on the bush where Josephine put it; the handkerchief was a white one.

Being cross-examined, she stated that she saw Josephine squeezing the handkerchief into the teapot when she was going to ask her mistress if tea should be made; then she stated that she saw Josephine squeezing the handkerchief when she went with Josephine to the store-room to get the tea; and afterwards stated that she saw her washing the handkerchief at the kitchen door when she was returning from the house with the message to Josephine to make tea, and *then* she saw Josephine hang it on the bush from which witness afterwards took it. Witness said that none of the negroes on the place, nor her master nor mistress, had ever talked to her about the poisoning since it occurred.

Raney, a slave, for the defense, testified that on the morning after the poisoning witness went into the room where Josephine and George were tied; talked with Josephine, and charged her with the poisoning. Josephine said, "You all make more fuss than the white folks. I am not the first that has done such a

thing by ten thousand." Josephine said nothing about George. Becky and Abram were present.

Abram, a slave, for the defense, testified that on the morning after the poisoning he saw Josephine in the house, when Becky and Raney were there, and heard Josephine say what was testified to by the witness Raney.

Becky, a slave, testified the same as the two last-named witnesses, and stated further that Josephine said that if she could call back yesterday for to-day she would do it, but it was too late. She said, "I did not tell Uncle George to give me the strychnine; if you can all clear George by talking, do it." Witness had been George's wife seven or eight years before; lived with him two or three years; had no children by him. Witness is the mother of witness Maria, who usually slept in the dwelling-house.

Dr. Mason, for the defense, testified that on the night of the day on which the poisoning took place he talked with Josephine. She was then tied. She said "she did not do it; that George came into the kitchen and asked for a spoon; she was standing in another part of the kitchen: thought he was going to take medicine; had her back to him; turned round and saw George stirring in the teapot. He then reached up to the plate of the house on which the rafters rested, and said, 'I'll lay this up there; don't disturb.' She understood him to mean the vial." Witness then took her into her room, and asked her if she and George had not conspired to poison the family. She said they had; but that she did not know that George was going to do it. Witness asked her where the poison was. She said she did not know. Witness asked again. She said she could tell where George said it was, and that George said it was thrown into the fire in Mr. Forbes' room. Witness then went into that room and found in the fire-place the fragments of a vial, the glass being a little fused; the fire must have been burning at the time it was thrown in. Witness heard, on the night of the poisoning, witness Maria say she had seen Josephine strain something through a handkerchief into the teapot, and then wash the handkerchief and hang it out on a bush behind the kitchen. Witness directed Maria to bring the hand-

kerchief to him; she brought a white linen handkerchief, which appeared to have been recently washed, and not ironed.

Cross-examined.—Witness stated that Josephine, when first examined, exonerated herself, and tried to throw it all on George. Witness did not see George that day until shortly after his arrest; he did not then exhibit any alarm, and appeared natural, just as he does now. This was between ten and eleven o'clock at night. Witness, in order to induce Josephine to tell all she knew, promised to get her off on a steamboat and save her. This promise was made to her before she made any confessions.

Lafayette Jones, for the defense, testified that his house is placed on blocks three or three-and-a-half feet high. The window spoken of by Josephine, and to which she said George came the second time to speak to her, is eighteen inches or two feet from the floor. Does not think one standing on the outside by the window could be seen by one within, and at the foot of the bed, where Josephine was tied sitting in a chair; the head of the outside person might be seen by a person standing up at the foot of the bed.

Judge McGuire, for the defense, testified that he was father-in-law of Jones, and went to his house on the evening the poisoning took place, and talked with Josephine. She told him that George came into the kitchen and wanted a spoon, as he said, to take medicine. She was accustomed to his taking medicine. The stove was in the middle of the room, and she was on one side, and he on the other. He got a spoon, and put some white stuff in it, and put it in the teapot; he then laid the vial on the plate or joist of the house. Witness further stated that witness Maria told him and others that she saw Josephine strain something into the teapot, through a white handkerchief; that she saw Josephine wash the handkerchief and hang it out to dry on a bush. Maria said this in the presence of Josephine. Dr. Mason then told Maria to bring the handkerchief, which she immediately did. It had the appearance of having been recently washed, and not ironed. Josephine first denied all knowledge of it, but afterwards said it was hers. George was about the yard when he was arrested. Josephine told him and

others that witness Eliza saw George give her a vial. Eliza being interrogated, said she had seen George give Josephine the vial.

This was all the testimony for the defense. Thereupon the state, after having proven that the identical handkerchief before referred to had been delivered to Professor W. D. Moore, and in the same condition as when produced by Maria, introduced Moore as a witness, who testified that he cut parts of the handkerchief, as follows: a square in the centre of the handkerchief, in size about equal to the border on all sides remaining after the square was cut out, and also cut out strips running from the corners of said square to within a short distance of the adjacent corners of the handkerchief. These strips were two and a half inches wide. He submitted the pieces so cut out to chemical tests, and he found a great deal of starch in them, and found no trace or sign of arsenic. He had employed such tests as would certainly have discovered arsenic if it had been filtered through the handkerchief on the 29th of February, 1857, and afterwards washed, as stated by the witness Maria. He also submitted the remainder of the handkerchief to chemical tests, and discovered starch in it, but that he had not applied to it any chemical test which was used for discovering arsenic. He gave a detailed statement of the tests applied, and how he applied them.

The court then instructed the jury in behalf of the state as follows:

1. A prisoner may be convicted on circumstantial evidence as well as on direct and positive testimony. Great care and caution should be used by the jury in the investigation of such evidence. When, after due care and caution in the investigation of circumstantial evidence, a full conviction on the minds and consciences of the jury of the guilt of the accused, to the exclusion of all reasonable doubt, is produced, the law authorizes the jury to act upon it. Circumstantial evidence, which satisfies the minds and consciences of the jury, to the exclusion of all reasonable doubt, is sufficient to justify a conviction. Absolute demonstrative certainty is not essential to proof by circumstances; it is sufficient if the circumstances produce moral certainty, to the exclusion of all reasonable doubt. The legal test

of the sufficiency of evidence, either circumstantial or direct and positive, to authorize a correction, is its sufficiency to satisfy the understanding and consciences of the jury, to the exclusion of all reasonable doubt of the prisoner's guilt."

2. To authorize the jury to find the prisoner guilty, there should be evidence before them sufficient to satisfy their minds of his guilt beyond a reasonable doubt; that which amounts to mere possibility only, or conjecture, or supposition, is not what is meant by a reasonable doubt. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the evidence before them.

3. If the circumstances in the case proven before the jury satisfy their minds of the guilt of George, as charged in the indictment, to the exclusion of every reasonable doubt arising from the evidence before them, and are sufficient to satisfy their minds and consciences, to the exclusion of every reasonable doubt of his guilt, as above explained, they will find him guilty as the indictment charges.

4. The testimony of the girl Josephine is competent legal testimony for the consideration of the jury, and is to be as fully weighed and considered as any other testimony in the cause, but may be impeached or disregarded by the jury if, from her situation as a joint defendant, or other facts and circumstances connected with her testimony, or her interest or bias in the result of this case, the jury should believe her not entitled to credit. The jury can, however, receive the whole of her statement as true, if they believe it, or reject it if they do not believe it, or receive a part or reject a part, as they believe it to be true or false.

5. If the jury believe from the evidence before them, beyond all reasonable doubt arising in the case, that George administered the poison himself, or aided and abetted any other person in anywise in the administration of the same, and thereby caused the death of the person, as charged in the indictment, they are bound to find him guilty.

6. That if the jury believe from the evidence, beyond all reasonable doubt arising in the case, that George was not the party who actually administered the poison through the tea, but had a

guilty knowledge and participated in the administration of the same, or if he was cognizant of the administration of the same, and aided and consented thereto, he is to be regarded as a principal in the poisoning, and they must convict him.

7. If the jury believe the testimony of Josephine to be entirely true and entitled to credit, and are satisfied beyond a reasonable doubt, from that testimony and other facts detailed in the evidence, of the guilt of the defendant George, they may convict on the testimony of the said Josephine, and upon the said facts detailed by other witnesses, or upon the testimony of said Josephine alone, if they believe it to be true, and it establishes the guilt of the accused of the offense charged.

The following instructions were asked by defendant, but refused or modified as follows:

1. The court instructs the jury that, before they can find the prisoner guilty on circumstantial proof, that proof must be so absolute, conclusive, positive, and certain, as to exclude from their minds every other reasonable *supposition or belief.*

This instruction was modified by striking out the words in italics, and adding "hypothesis or probability arising from the evidence in the case but that of the prisoner's guilt."

2. That to justify a conviction on circumstantial evidence, it is necessary that the circumstances should be such as to exclude to a moral certainty any other *supposition but that of the prisoner's guilt.*

This instruction was modified by striking out the words in italics, and adding the same words as were added to the first instruction.

3. Whenever circumstantial evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of the hypothesis of guilt rather than another, such evidence cannot amount to a legal proof of guilt, however great the probability may be.

This was modified by inserting after the word "hypotheses." in the second line, the words, "arising from or growing out of the evidence and the facts and circumstances detailed in proof."

4. If there be any fact established by the evidence in the case which is irreconcilable with the hypothesis of the prisoner, the

jury must acquit, although all the other facts and circumstances of the case may agree with the hypothesis of guilt *to the minutest extent.*

The court modified this instruction by striking out the words in italics.

The fifth instruction, as asked, is printed in italics, the modifications made by the court are printed in italics, as follows:

5. In order to justify the inference of legal guilt from circumstantial evidence, the inculpatory *or criminating* facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis *arising from the evidence, or growing out of the proof in the case*, than that of his guilt.

6. If the jury have a reasonable doubt of the guilt of the prisoner, *however small that doubt may be*, if it arise from the testimony they must acquit.

This was modified by striking out the words in italics.

The seventh instruction as asked is printed in Roman letters; the modifications of the court are printed in italics, as follows:

7. That though the testimony of Josephine was competent and admissible, yet *she being a party jointly indicted with the defendant*, it should be received *and considered* with caution; and in weighing it the jury have a right to, and should take into consideration her situation, and the temptation *she may have* to swear falsely, and give it such consideration as they may deem proper. They have the right to disregard it altogether *if they disbelieve it, or do not deem it entitled to credit*, or take such parts of it as may be consistent with the other testimony in the cause, *or they may receive and act upon the whole of it if they believe it to be true and entitled to credit.*

The eighth, ninth, and tenth instructions, as asked and modified by the court, are printed in the same manner as the seventh, as follows:

8. That if a witness has made statements out of court which he or she denies under oath in court, the jury may discredit her or her testimony altogether *if they disbelieve it or do not deem it entitled to credit, or they may act upon the whole of it*, or

take such portions of it as may be consistent with the other proof in the cause, *if they believe it to be entitled to credit.*

9. That in order to discredit the testimony of a witness, it is not necessary to produce witnesses to swear that they would not believe him or her under oath. The manner of a witness in testifying, his or her situation, and motives to commit perjury, *if any such appear in the case*, proof of his or her having made statements which on examination he or she has denied under oath, may be all taken into consideration as affecting his or her credit; *and if upon so considering the testimony of the witness the jury do not believe it to be entitled to credit, they*, the jury, may disregard, either in whole or in part, the testimony of such witnesses.

10. That the jury are the exclusive judges of the sufficiency of the testimony; those circumstances under which a witness may testify before them, the incentive to falsehood, the direct interest which they may have in the conviction *of the party against whom the witness testifies*, as well as the character of the witness, are circumstances to be weighed by the jury; and if they believe from the evidence that such inducements were present, and operated on the mind of the witness Josephine when she testified before them as induced her to testify falsely, or should discredit her testimony, her statements not corroborated *by other testimony in the cause* should be disregarded altogether, and such statements as are corroborated *by other testimony in the cause* should have such weight as the jury may think them entitled to, *in consideration of them with the other testimony in the cause.*

The prisoner was convicted of murder, and thereupon he moved for a new trial on the following grounds:

1. Because Walker, one of the jury who tried defendant, was an unnaturalized foreigner at the time.

2. The jury found contrary to law and the evidence.

3. The court erred in instructing the jury.

In support of the first ground of the motion, the defendant read the affidavit of Walker, one of the jury, who swore that at the time of the trial he was an unnaturalized foreigner, and not a citizen of the United States; also defendant's own affidavit

and that of his counsel, in which it was denied that they knew of Walker's disqualification as aforesaid.

The motion was overruled, and the defendant excepted and sued out this writ of error.

Brooke and *Smedes*, for plaintiff in error.

The court manifestly erred in the several modifications of the defendant's instructions. All of these instructions, as asked by the defendant, are couched in the language of the law as sanctioned by this court in several cases. McCann v. State, 13 S. & M., 471; Cicely v. State, ib., 202; Browning v. State, 30 Miss., 656. The court may change or modify an instruction so as to make it conform to the law. (Boles v. State, 9 S. & M.) But if the instruction is in conformity with the law, as asked, it is error to change or refuse it. Lambeth v. State, 23 Miss., 322.

Those instructions in relation to the credibility of certain witnesses, were erroneously modified. It is undoubtedly true that, under the benign rule of the law, a prisoner has the benefit of any doubts in the testimony of any witness against him, especially when such witness' testimony conflicts with other testimony in the cause. So was also the sixth instruction erroneously modified. The prisoner is, undoubtedly, entitled to the benefit of any reasonable doubt arising from the testimony, however small that doubt may be. By changing this instruction, the court undertook to measure the quantity of such doubt, and which left an unfortunate impression on the minds of the jury.

The indictment should have been quashed, or the district attorney compelled to elect on which count he would proceed. Brantley v. State, 13 S. & M., 468.

The court should have granted a new trial, for the reason that one of the jurors who tried the cause was an alien. This was proven by the affidavits of the juror himself, and also it was shown by the affidavits of the prisoner and his counsel that the fact was not known to either of them before the verdict. Seal v. State, 13 S. & M.

T. J. Wharton, attorney general.

1. There was no error in refusing to quash the indictment, or in refusing to compel the district-attorney to elect on which count of the indictment he would try the defendant. Brantley v. State, 13 S. & M., 470; Norris v. State, 33 Miss., 373; Strawhern & Grizzle v. State, 37 Miss., 42; Wash v. State, 14 S. & M., 120; Sarah's case, 28 Miss., 274; 8 Wend., 203; 12 ib., 425; 12 Pick., 1; Wharton's Am. Cr. Law, 149, *et seq.*

2. The competency of an accomplice as a witness against the principal is well settled. Wharton's Am. Cr. Law, 301; 10 S. & M., 192.

3. The fact that Walker, an unnaturalized foreigner, sat on the jury, is no ground for reversal, so long as it appears that no objection was made to him at the time he was sworn. Seal v. State, 287. Then was the time, and only time, when the inquiry could come up; and defendant waived the objection because he failed to make the inquiry as to Walker's qualifications at the proper time. Williams v. State, 37 Miss., 409.

SMITH, C. J.:

The plaintiff in error and Josephine, who are slaves, were jointly indicted in the circuit court of Bolivar county for the murder, by the administration of poison, of Lelia Virginia Jones. The indictment contained two counts. In the first, the parties were charged jointly as principals; and in the second, Josephine was charged as principal, and the plaintiff in error as accessory before the fact. Upon the application of the district attorney, and with the consent of the counsel, the plaintiff in error was tried separately, and convicted of the murder.

Before proceeding to trial, the plaintiff in error moved to quash the indictment upon the ground that there was an improper joinder of counts; which motion being overruled, he moved the court to compel the district attorney to elect as to which of the counts in the indictment the prisoner should be tried on. This motion was also overruled, and this action of the court is made the first ground of exception to the judgment.

The rule on this subject is well settled in this court. It is held that, in point of law, there is no objection to the insertion

of several distinct felonies of the same degree in the same indictment against the same offender. And if the joinder of more than one distinct felony in the same indictment be objected to before plea, the court will quash the indictment, lest it should embarrass the prisoner in his defense, or prejudice him in his challenge to the jury. But this is not regarded as a right, strictly speaking, of the accused, but as a matter submitted to the discretion of the court, which it may exercise as a measure of prudence for the safety of the accused.[1] Wash v. The State, 14 S. & M., 120; Sarah v. The State, 28 Miss. R., 267.

The court, therefore, committed no error in refusing to quash the indictment for the alleged reason, or in refusing to compel the district attorney to elect as to which of the counts in the indictment the prisoner should be tried on. Moreover, the court had no discretion in the case. The motion for either purpose was made too late. The prisoner had been arraigned, and had pleaded to the indictment, before either the motion to quash the indictment, or to compel the district attorney to elect, was interposed.

During the progress of the trial, Josephine, the party jointly indicted with the plaintiff in error, was tendered as a witness in behalf of the prosecution, and was objected to upon the ground of incompetence. The objection was overruled, and the defendant took his exception.

This ruling of the court is assigned for error; but as the point has not been pressed in the argument of counsel, it is sufficient to remark that in this respect no error was committed.

[1] State v. Crank, 2 Bailey, 66; 1 Chitty Cr. Law, 252, 253; Kane v. People, 8 Wend., 203: 12 ib., 455; Wharton's Am. Cr. Law, 414, 415; Carlton v. Commonwealth, 5 Metc., 532; Moody v. State, 1 W. Va., 337; State v. Hood, 51 Me., 363; Cory v. State, 3 Port., 186; Stone v. State, 1 Spencer, 404; Rex v. Ferguson, 29 Eng. C. L. R., 536; Baker v. State, 4 Pike (Ark.), 56; People v. Rynders, 12 Wend., 425; Edge v. Com., 7 Barr, 275; Coulter v. Com., 5 Metc., 532; State v. Kirvy, Miss., 317; Mills v. Com., 1 Harris, 631; Hoskins v. State, 11 Geo., 92; Engleman v. State, 2 Carter (Ind.), 91; U. S. v. O'Callahan, 6 McLean's C. C. R., 569; Johnson v. State, 29 Ala., 62; Orr v. State, 18 Ark., 540; Com. v. Tuck, 20 Pick., 356; State v. Brady, 14 Vt., 353; State v. Crocker, 3 Harr. (Del.), 554; State v. Grisham, 1 Hayw., 12; Josslyn v. Com., 6 Metc., 236; State v. Flye, 26 Maine, 312; People v. Austin, 1 Parker's Cr. R., 154; State v. Patterson, 1 W. & M., 305, Com. v. Manson, 2 Ashmead, 131; McGregg v. State, 4 Blackf., 101; State v. Coleman, 5 Porter, 32; Wash v. State, 14 S. & M., 120; People v. Baker, 3 Hill, 159; State v. Hogan, Charlton, 474; Carlton v. Com., 5 Metc., 532; 1 Archbold's Cr. Pr. and Pl., 95; Rex v. Jones, 2 Camp., 131; Rex v. Johnson, 3 M. & S., 539; Young v. Rex, 3 T. R., 98; Rex v. Towle, 2 Marsh, 466; Rex v. Galloway, R. & M. C. C. R., 234; 2 Leach C. C., 1105, n.

Numerous exceptions are taken to the granting of certain instructions asked in behalf of the prosecution, and to the action of the court in modifying those requested by the defendant.

Without noticing these exceptions in detail, we deem it sufficient to say that, after a careful and critical examination of the charges given for the state, and of the instructions as modified and given for the defendant, that in no single instance has an error been committed of which the plaintiff in error has a right to complain.

The remaining exception refers to the judgment of the court on the motion for a new trial.

First, it is insisted that a new trial should have been awarded for the reason that one of the jurors who returned the verdict was an alien, and hence not a qualified juror, according to the law of this state; and, secondly, because the evidence was not sufficient to authorize a conviction.

1. It appears, from the evidence in this case, that one C. A. Walker, who was summoned as a juror in this case, after examination by the state, was tendered to, and excepted by, the prisoner as a juror. It also appears, from affidavits filed in support of the motion for a new trial, that said Walker was at the time an unnaturalized foreigner, and that this fact was unknown to the prisoner or to his counsel until after the rendition of the verdict.

By the express terms of the statute, Code, 497, art. 126, the said Walker was disqualified to act as a juror in the case, and would, hence, have been set aside, if his want of qualification had been made known to the court, unless the objection had been waived by the defendant. The question, then, here to be considered, is, whether the plaintiff in error, who had it completely in his power to ascertain whether the juror tendered to him was not disqualified, must not be held to have waived the objection.

The statute is careful of the rights of parties capitally charged. It has provided efficient means to secure to them a fair trial by an impartial jury of their country. To this end a special *venire* is awarded, to be drawn from a list of the names of the qualified jurors of the county; and the party to be tried

is entitled to be served with a copy of the *venire* one entire day before he can, without his consent, be put upon trial. The object of this is, manifestly, to afford him an opportunity to ascertain not only whether the jurors summoned are legally qualified, but what are their dispositions and feelings in regard to himself. He is entitled to examine each person presented to him as a juror, in relation to his qualifications, as well as to the state of his convictions in reference to his own guilt or innocence. Sound policy, therefore, dictates that he shall not be permitted, after having had a chance of acquittal, to insist as a ground for a new trial upon a want of qualification in the jurors, of which he might have availed himself as a cause of challenge, by using proper diligence. And such is the rule generally held in this country. 2 Bay, 153; 2 Nott & McCord, 261; 4 Dallas, 353.

This precise question has never been determined by this court, but the principle laid down, and the reasons assigned for it, in Williams v. The State, 37 Miss. R., 407, fully cover the question under consideration. The fact that the accused in this case was a slave, and not a free white person, constitutes no sufficient reason for departing from a rule founded in good sense and manifest policy.

2. Excluding the testimony of the witness Josephine, it is very certain that the facts proved by all the other witnesses do not, beyond a reasonable doubt, establish the guilt of the plaintiff in error; but it is equally certain that, giving full credit to her testimony, the proofs were altogether sufficient to warrant the verdict of the jury. There was a conflict between the testimony of the witness Eliza, a witness examined for the defense, and that of Josephine; and it is manifest that if the jury had given full credit to the former, the result of their deliberations might have been very different. But in such a case, that is, where there is a conflict in the evidence, it is the peculiar province of the jury to decide upon the credibility of the respective witnesses, and to believe the statements of those whom they judge entitled to credit. We are not prepared to say, under all of the circumstances proved by the testimony, that, according to the rules of law, the jury were not authorized to disbelieve the

statements of the witness Eliza, and to credit the testimony of Josephine.

There is also a direct conflict in the testimony of the negro girl Maria, who was examined for the defense, and that of this witness. Maria was the daughter of the wife of the accused, and was, when examined, but eleven years old. Her testimony tends strongly to show that Josephine was the sole agent in the perpetration of the murder. But her testimony is indirectly impeached by that of Professor Moore, who proved that, although there was arsenic in the tea, there was no evidence of the presence of that poison about the handkerchief through which the witness said Josephine had strained something into the teapot. Upon a survey of all the circumstances proved at the trial, we think the jury were fully justified in disbelieving the testimony of the witness Maria.

It is possible that the witness Josephine, in delivering her testimony, may have been influenced by the hope or expectation that, by procuring the conviction of the plaintiff in error, she might escape the consequences of her own crime. But of this fact, as well as of all the circumstances in proof before them, the jury enjoyed a much better opportunity of forming a correct judgment than we possess, who can only look at the transaction through the medium of a record. They were clearly and fully instructed as to the law and their duties in reference to the testimony of the witness Josephine; and having, after a careful and dispassionate examination of the whole evidence, as we must suppose, given credit to her testimony, and rendered their verdict accordingly, we are not authorized to set it aside.

Judgment affirmed.

JEFF (A SLAVE) *v.* STATE, 39 Miss. R., 593.

ASSAULT WITH INTENT TO KILL.

The law presumes that a person intends to do not only what he accomplishes, but also the natural and probable consequences of every act done by him. But this presumption only amounts to *prima facie* and not to conclusive proof of such intention. The jury should be left free to consider whether the testimony offered by

the accused to rebut this legal presumption, or otherwise submitted to them on the part of the state, satisfied their minds of the absence of such intention. Jeff v. State, 37 Miss., 321.

In considering technical attempts to commit crime, the jury may take into consideration the nature of the act done, and the attendant circumstances, as matter of evidence to determine the particular intent with which it was performed; they may infer the specific intent to do a particular thing, which is the necessary or even probable consequence of the act proven to have been done.

Proof of the use of a deadly weapon in an assault and battery by one person upon another is *prima facie* evidence of an intent to kill, which must prevail unless rebutted by other proof in the cause.

The law presumes every person to be innocent until the contrary is proved. But when an *unlawful* act is proven, the presumption of innocence is rebutted, and the law presumes such *unlawful* act to have been *criminally intended*, unless the contrary is made to appear. 1 Greenl. Ev., 42, 43, § 34.

Error to Panola circuit court. THOMPSON, J.

The plaintiff in error, Jeff, a slave, was indicted for an assault and battery on one John Ballantine, his master, with intent to kill and murder. Upon a former trial he was convicted, and upon a writ of error to this court the judgment was reversed and remanded. He was again arraigned in the court below for trial on the plea of not guilty.

The evidence on both trials was the same, which will be found fully set forth in a report of the first case, 37 Miss., 321.

For the state, the court instructed the jury as follows:

1. If any slave shall commit an assault upon any white person, with intent to kill, upon express malice, and not in necessary self-defense, every such slave may be indicted therefor, and on conviction shall suffer death; but no proof of express malice shall be required to make such assault capital, when the assault with intent to kill is committed by a slave on his master, mistress, overseer, or employer, in resistance of legal chastisement.

2. That malice is implied by law from the nature and character of the weapon used; and if the jury believe from the evidence that the master of the slave Jeff was about to inflict legal chastisement, and that Jeff resisted that legal chastisement, and made an assault upon his master with a deadly weapon, that this is *prima facie* evidence that he intended to kill his master, and the jury will find him guilty as charged, unless, from the whole proof in the cause, they are satisfied that he did not intend to kill.

3. That a slave is bound to submit to the chastisement of his

master, overseer, or employer, and that he has no right to use a deadly weapon to cut himself loose from the whipping; and if the jury believe from the evidence that the defendant's chief desire was only to get away and avoid a whipping, yet if they believe that he used a deadly weapon to enable him to get loose, and cut his master with it, and it was the natural or even probable consequence of his act to produce the death of his master, then they will find him guilty as charged, unless they are satisfied from the whole evidence that he did not intend to kill.

4. That if the state has proved that the defendant resisted the legal chastisement of his master, and in such resistance cut his master with a deadly weapon, then the law presumes that he intended to kill, and the defendant must prove that he did not intend to kill his master, unless that proof arises out of the evidence against him; and it is immaterial whether he prepared himself with a deadly weapon, or whether he habitually carried the same.

5. That it is true that the state must prove that the defendant did intend to kill his master, but that we can only judge of the intentions of another from his admissions or overt acts, and the law presumes every person to intend to do that which is the natural or even probable consequences of his acts.

6. That when a *prima facie* case has been made out against the defendant, the jury are bound to act on that *prima facie* case, as much as if it were conclusive, unless it is rebutted and overcome by the whole proof in the cause.

7. That the defendant is entitled to the benefit of every reasonable doubt, but that absolute metaphysical and demonstrative certainty is never required, and that which amounts to mere probability or supposition is not what is meant by a reasonable doubt.

The following instructions were among those asked by the defendant:

3. "That in this case the defendant ought not to be found guilty as charged, unless his intent in fact was the same as laid down in the indictment;" which was modified by the court as follows: "This intent may be proven by the presumption of law that a man is presumed to intend to do that which is the natural

consequence of his act deliberately done; but that such presumption of law may be met and rebutted by proof introduced by the defendant, or by the facts given in evidence against the defendant by the state."

The prisoner excepted to the instructions given in behalf and to the modification of the third instruction for the defendant.

The jury returned a verdict of guilty; and upon his motion for a new trial being overruled, the prisoner sued out this writ of error, and assigns for cause of reversal the following errors:

1. The court below erroneously charged the jury on the motion of the state.
2. The court erred in modifying defendant's third charge.
3. The verdict is contrary to the law and the evidence.

J. W. C. Watson, for plaintiff in error.

The intent of the defendant in making the assault was a question of fact for the jury. The law raises no presumption about it. State v. Stewart, 29 Miss., 419. The jury could not legally convict, unless satisfied from the whole evidence that the defendant had in his mind a positive intention to kill; and it is not sufficient that it would have been murder had death ensued. Regina v. Cruse, 34 Eng. C. L. R., 522; State v. Bill, 3 Harrington, 571; Bishop Cr. Law, 514.

The *particular intent* is essential to constitute the felony. The class to which this case belongs is clearly distinguished from that class in which a general felonious intent is sufficient to constitute the offense. The doctrine of an intent in law, different from the intent in fact, although applicable to the latter class, is not applicable to the former. 3 Harrington, 571; Ogletree v. State, 28 Ala., 693, 701; Jeff v. State, 37 Miss., 321. Admitting the fact that the weapon used was calculated to produce death, and it by no means follows that the offense is made out; for with such a weapon a very harmless assault may be made, and one without the slightest intention of taking life. Seitz v. State, 23 Ala., 43; Henry v. Patrick, 1 Dev. & Batt., 358.

The third charge is in flagrant violation of the well-settled principles of law applicable to the case, since it makes an assault with intent merely to escape a whipping equivalent to an as-

sault with intent to kill. Where facts connected with the transaction show a motive, an immediate cause for the act done, the law assigns the deed to that motive, the effect to its immediate cause, and will not legally admit that it was the consequence of any preconceived purpose. State v. Will, 1 Dev. & Bat., 164.

The defendant introduced no testimony, but relied for his defense on that offered by the state. The principle may be broadly stated, that when the defendant relies on no separate, distinct, and independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof continues throughout with the prosecution. Wharton Am. Cr. Law, 264, 265; Payne v. Commonwealth, 1 Metc., 375.

In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; no mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generates full belief of the fact to the exclusion of all reasonable doubt. 1 Starkie Ev., 543.

The proof shows no act by the defendant, "the natural or even probable consequences of which" would have been the death of his master. 29 Miss., 49; 28 Ala., 693; 3 Harrington, 571; 23 Ala., 43; 1 Metc., 375; Dev. & Batt., 358.

T. J. Wharton, attorney general,

Argued the case orally, and filed an elaborate brief, reviewing all the evidence in the case, and the points made by the counsel for plaintiff in error. He cited and relied on the following authorities: 22 Ala., 23; 9 Yerg., 343; 13 S. & M., 264; 15 Ga. R., 535.

HARRIS, J.:

The main points presented in this cause were fully considered and determined by this court when the case was here before. They were then carefully examined, and the result of the examination of the various authorities briefly stated. The case was then reversed, because the court had instructed the jury that if the plaintiff in error "made an assault and battery upon his

master or employer with a deadly weapon, and not in necessary self-defense, then they will find him guilty as charged;" thereby excluding the *intent as a question of fact* from the consideration of the jury.

It is there said, that "in *presumption of law*, the plaintiff in error, in the absence of proof to the contrary, will be held to have intended the natural and probable consequences of every act deliberately done by him. But this presumption only amounts to *prima facie*, and not conclusive proof of such intention. The jury should have been left free to consider whether the testimony offered by the accused to rebut this *legal presumption*, or otherwise submitted to them on the part of the state, satisfied their minds of the absence of such intention." Jeff v. The State, 37 Miss. R., 321.

The same principles asserted in the opinion just cited, were presented to the jury in several charges given by the court at the instance of the state, and also in a modification of one of the defendant's instructions on the last trial; and these are the grounds of error assigned for reversal now.

The cause has been again argued before us with distinguished zeal and ability, and upon the supposition that the principle asserted in our previous opinion is in harmony with the rules now contended for by counsel for the accused.

In this we think that counsel are wholly mistaken. But as mere pride of *consistency*—especially in adhering to error—is no part of the meed we covet in our judicial labors, we have given full consideration to the arguments and authorities relied on to establish the conclusion contended for, without reference to our former opinion.

That there are some precedents to be found in the books where the principle is asserted that the intent of the defendant in making the assault is a question of fact for the jury, *and that the law raises no presumption about it* in cases of this description, should not be matter of surprise, considering their great number and variety, as well as the labor-saving facility with which precedents are sometimes made.

Looking back to the doctrines of *presumptive evidence, and the reason on which they rest*, as stated by the elementary

writers, the question at issue will be relieved of most, if not all difficulty or obscurity.

The law does not always require the production of *direct or positive proof* of the existence of acts, facts, or intents, upon which to base its judgments. Deriving its principles often from human experience of human *motive and conduct*, it infers, or presumes sometimes, the existence of one from proof of the other. Indeed the elementary writers on the law of evidence abound with illustrations of *legal presumption*, which are even *conclusive and indisputable*, founded on this philosophy of human experience, as to the intimate connection between human *motive* and human *conduct*. The rule of law, in such cases, is not always a rule of inference from testimony alone, but sometimes a rule of protection, as expedient for the general good. These general doctrines of presumptive evidence are not peculiar to the municipal law, but are shared by it in common with other departments of science. Thus the presumption of a malicious intention to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle of its application. The one fact being proved, the other, its uniform concomitant, is universally and safely *presumed*. It is this "*uniformly experienced connection*" which leads to its recognition by the law without other proof; the presumptions having more or less force in proportion to the universality of the experience. Hence the doctrine of *conclusive* and *disputable*, or *prima facie*, presumptions. See 1 Greenleaf Ev., p. 20, § 14.

Of this latter class (disputable or *prima facie* presumptions of law) is the general presumption of innocence. As men do not *generally* violate the penal code, the law presumes every man *innocent*, until the contrary is proven. So, on the other hand, as men seldom do *unlawful* acts with innocent intentions, when an *unlawful* act is proven the presumption of innocence is rebutted, and the law presumes such *unlawful* act to have been *criminally intended*, until the contrary is made to appear. 1 Greenleaf Ev., pp. 42, 43, § 34.

In the third volume of his work on evidence, Mr. Greenleaf,

at p. 17, § 13, further illustrates these views. He says: "Another cardinal doctrine of criminal law, founded in natural justice, is, that it is the *intention* with which an act was done, that constitutes its criminality. The intent and the act must both concur to constitute the crime; and the intent must therefore be proved, as well as the other material facts in the indictment. The proof may be either by evidence, direct or indirect, tending to establish the fact; *or by inference of law from other facts proved.* For, though it is a maxim of law, as well as the dictate of charity, that every person is to be presumed innocent until he is proved to be guilty, yet it is a rule equally sound, that every sane person must be supposed to intend that which is the ordinary and natural consequence of his purposed act. Therefore, when an act, *in itself indifferent*, becomes criminal, if done with a particular intent, there the *intent* must be proved and found; but when the act is *in itself unlawful*, the proof of justification or excuse lies on the defendant, and in failure thereof, *the law implies a criminal intent.*" And this is the very language employed by Lord Mansfield in Rex v. Woodfall, 5 Burr., 2667, on an information for printing and publishing in the "Public Advertiser," a seditious libel, signed *Junius*, decided in 1770.

So, in the case of Rex v. Farrington, 1 Eng. Crown Cases (Russ. & Ry.), 207, the prisoner was indicted for setting fire to a mill, with *intent* to injure the occupiers thereof; and it was held by all of the twelve judges present, that an injury to the mill, being the necessary consequence of setting fire to it, the *intent to injure* might be inferred; for a man must be supposed to intend the necessary consequences of his own act. See also, Rex v. Cox, id., 362.

In Duffie's case, id., 364, this question did not arise. There the jury expressly negatived the intent laid in the indictment, and found him guilty of the act charged, but with a different intent from that laid in the indictment. As, however, the intent found by the jury was embraced in the prohibition of the statute upon which the indictment was founded, though not included in the indictment, the crown officer insisted that the conviction was right and sentence should be pronounced, and

this was the question reserved for the opinion of the twelve judges, who held that the conviction could not be supported.

The case of Rex v. Boyce, 2 Eng. Crown Cases (Moody), 29, is a case of the same kind, where the jury expressly negative the intent laid in the indictment, but find him guilty of another intent, and the judges on the point reserved held the conviction wrong.

The case of Rex v. Gillon, id., 85, only decides, that where *two intents* existed, it was immaterial which was the principal intent and which the subordinate one; and, therefore, where one only was charged, and the jury found *that* intent as existing, but only as secondary to another *principal* intent not laid in the indictment, the conviction was held proper.

The case of Rex v. Hunt, id., 93, was an indictment for maliciously cutting. The intent charged in the first three counts, was to prevent apprehension; in the fourth, to do the prosecutor some grievous bodily harm. The jury found the prisoner guilty, and stated, that the thrust was made with intent to do some grievous bodily harm upon anybody upon whom it might alight, though the *particular cut* proved was not calculated to do so. The court held, that malice against the individual cut is not essential; that general malice is sufficient; that the *intent* to do grievous bodily harm is sufficient, though the cut is slight, and not in a vital part; that the question in such case is, not what the wound *is*, but what wound was intended.

The case of Regina v. Cruse and wife, reported in 8 Carr. & Payne, 541, and cited by counsel from a mere syllabus contained in the 34th volume of English Common Law Reports, is not in conflict, so far as we can learn from the book referred to, with the general doctrine above stated. It only decides, that "on an indictment under the statute, 1 Vict., ch. 85, § 2, for the capital offense of inflicting an injury dangerous to life, with intent to murder, the jury ought not to convict, unless they are satisfied that the prisoner had in his mind a positive intention to murder; and it is not sufficient, that it would have been murder if death had ensued."

From the review of this case, contained in the last edition of

Mr. Wharton's Treatise on American Criminal Law, it is evident the question we are now considering did not arise in the case of Cruse and wife, above cited. The author, in treating of "*intoxication as a defense*," and its effect upon the question of *intent*, cites this case as follows: "So, again, where the charge was assault with intent to murder, Patterson, J., said, 'A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering the child, you may find them guilty of an assault.'" Wharton's Am. Crim. Law, 4th rev. ed., § 42; and see also his reference to the same case in § 120, further showing that it cannot be relied on as an authority for the position assumed in this cause by counsel for defense.

Mr. Russell, in treating of this same subject, refers to the same case in a note, and quotes Patterson, J., as follows: "Although drunkenness is no excuse in any crime whatever, it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention, and yet he may be guilty of very great violence."

See also 1 Bishop's Crim. Law, § 248 (end of section), and note 2, referring to the case, as not affecting the general rule stated by him, that "the law presumes that every person intends to do what he does, and intends the natural, necessary, and even probable consequences of his act." See again same author, § 269, and 299–301, treating of drunkenness as connected with *intention*, and also see § 514, and 3 Greenleaf Ev., §§ 6 and 7, as to this case. Not having the full report of the case at our command, we have been thus particular in observing its citations, for the reason that great reliance is placed upon it as an authority in this case, and it is also the foundation of the misconceptions of the judges in cases which are cited and relied on from some of the American courts, which we shall hereafter have occasion to notice.

In Rex v. Philip, 1 Moody Crown Cases, 263, it was resolved by the judges that burning of a ship, of which the defendant

was a part owner, voluntarily, was a wilful act, tending to destruction of the property of others, and that it was a necessary inference of law that *he intended* to injure them.

In Regina v. Hill, 8 Carr. & Payne, 274; 34 Eng. C. L. R., 388, before Mr. Baron Alderson, he is reported, in summing up, to have said: "There are two questions of fact, which I shall leave to you: first, did the prisoner utter this bill to Mr. Minor as a true bill, and meaning that he should take it as such? And, second, when he did so, did he know it to be forged? If you think that he did, you ought to find, *as a necessary consequence of law*, that he *meant* to defraud. I say, that you ought to *infer* it, if you are satisfied on the other two points. A man must be taken to intend the consequences of his own acts, and must intend to defraud if he pay another a false note instead of a real one."

Rex v. Dixon, 3 M. & S., 11, is a strong case in favor of the position that *the law* will infer or presume criminal intent from the doing an unlawful act. And to the same point is the case of Rex v. Woodburne et al., 16 Howell State Trials, 54, where the *intent* to maim was held to be a presumption of law from the acts proved.

It will be seen from the cases cited, that this doctrine is not peculiar to the law of homicide, but prevails in all the departments of criminal law.

Having noticed some of the principal English cases relating to the point under examination, we will now advert to some of their elementary writers.

In Foster's Crown Law, 255, the rule is thus stated in his introduction to his discourse on homicide: "In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence against him; for *the law* presumeth the fact to have been founded in malice, until the contrary appeareth." See also p. 290, to the same effect. Lord Hale, in his Pleas of the Crown, p. 455, says: "When one voluntarily kills another, *the law* presumes it to be malicious, and that he is *hostes humani generis*." Mr. Blackstone, in the 4th volume of his Commentaries, says

"that all homicide is malicious, and, of course, amounts to murder, unless when justified, excused, or alleviated into manslaughter; and all these circumstances of justification, excuse, or alleviation, *it is incumbent upon the prisoner to make out* to the satisfaction of the court and jury."

Mr. Hawkins, vol. 1, ch. 31, § 32, and Mr. East, vol. 1, 224, 340, state the rule substantially in the same way.

Mr. Russell, in vol. 2, pp. 730, 731 (7th Am. ed.), treating of the law of presumptive evidence, says: "Besides the presumptions which a jury may make from circumstantial evidence, there are also *presumptions of law*. Thus, on every charge of murder, the fact of killing being first proved, *the law* presumes it to have been founded on malice till the contrary appear; and therefore all circumstances alleged by way of justification, excuse, or alleviation, must be proved by the prisoner, unless they arise out of the evidence produced against him. Indeed," says he, "it is a universal principle, as Lord Ellenborough observed in the case of Rex v. Dixon, 3 M. & S., 15, that when a man is charged with doing an act, of which the probable consequences may be highly injurious, *the intention is an inference of law*, resulting from the doing the act;" and the same principle is stated on pp. 544, 545, id., and p. 362.

From the examination we have been able to make, we think it may be safely affirmed as the settled doctrine of the English law, with scarcely a respectable authority to the contrary, from the days of Lord Coke to the present time, "that a party is presumed to intend the natural or even probable consequences of his act," as an inference of law, subject to be rebutted by any evidence to the contrary in the cause.

Before proceeding to examine the cases referred to as establishing a different rule in this country, we will refer to the case of The Com. v. York, decided by Chief Justice Shaw, in 9 Metcalf, 93, as affording a most careful, able, and luminous discussion of the whole subject, and sanctioning the view we have taken of this case. It is true this was a case of murder; but Chief Justice Shaw, in his elaborate and learned judgment, discusses the general question, defines what is meant by malice in a legal sense, or malice in law, as contradistinguished from mal-

ice in fact. He says: "A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or wilfully does *an act* which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. * * *. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the *intention* to take life, or do him some great bodily harm, is a necessary conclusion from the act." 9 Metcalf, 103. After citing authorities in support of these positions, he says: "These instances, taken from cases having *no analogy to the crime of homicide*, are adduced to show that the presumption of malice, from a wrongful and injurious act, wilfully done, when applied to homicide, is not technical or artificial, or invented for this particular occasion, but is the result of a mode of legal reasoning, which is of *general application*." Id., 105. And on page 107, he adds *other* authorities "to show that the inference of malice from unlawful acts is not an artificial rule of law, but a natural inference, legitimately deduced from facts admitted or proved; and that it is not peculiar to the law of homicide, but prevails in all other departments of the criminal law."

To this effect, see Wharton's Am. Crim. Law, §§ 1172, 1173, 712, and numerous English and American cases cited. State v. Girkin, 1 Iredell, 121; State v. Green, 7 id., 39; Com. v. Webster, 5 Cush, 305.

The first case cited by counsel for the accused is the case of The State v. Stewart, 29 Mo. R., 421. In this opinion, not occupying twenty lines, without an authority cited, either by the counsel for defendant or the court, for the position, and without one word of explanation, the court says: "The intent of the defendant in making the assault was a question of fact for the jury. *The law raised no presumption about it*, and it was error for the court to tell the jury that the law presumes that every man intends the natural, necessary, and probable consequences of his acts." The facts of the case are

not given, and we are not, therefore, prepared to understand or appreciate the case as an authoritative precedent for our guidance.

The next authority relied on is Rex v. Cruse and Wife, 34 Eng. C. L. R., 522. We have already seen that this case does not touch the point now before us. It was a question whether the defendants, *in their intoxicated condition*, were capable of the *intention* which the law presumes from unlawful acts.

The next case cited is the case of The State v. Bill Jefferson, a slave, 3 Harrington, 571. "The prisoner was indicted for an assault and battery with intent to murder. He shot at a negro girl with a loaded gun, and within shooting distance. None of the shot hit her. The prisoner, when arrested, said that he meant to cripple, but not to kill."

This is the whole statement of the case contained in the report. The opinion of the court is as follows: The defendant is indicted for an assault on Alice James, with intent to commit murder; and the point is made, and has been argued, whether the jury must be satisfied that the defendant had an actual intention to kill; or whether the law implies the intent in case of an act likely to produce death, as it would imply malice from such an act, where death ensued. The act of assembly provides that if any negro or mulatto slave shall, with violence, make an assault upon another, with intent to commit murder, he shall be guilty of a felony, &c.

Under this act, we are of opinion that the intent must be proved, as well as the assault; but as the intent is a matter that can only be proved by other facts, all such facts must be considered in proof of the intent; as the character of the assault, the weapon used, the danger of producing death, and the means used to produce or avoid death.

"Such has been the decision under a similar British statute (Cruse's case, 8 Carr. & Pay., 541; 34 Eng. C. L. R., 522)."

The case is as barren of authority as the case cited from Missouri. The citation of Cruse and Wife, as a case in point, is a mistake, as already shown; and the reasoning of the court, if tending at all to a conclusion on the point in controversy, rather seems to favor the doctrine of the text-books, that the

intent may be proved "by inference of law from other facts proved." (3 Greenleaf Ev., p. 17, § 13.)

After quoting the act of assembly of Delaware, the court says: "Under this act, we are of opinion that the intent must be proved, as well as the assault; *but* as the intent can only be proved by other facts, such facts are to be considered in proof of the intent, the assault, the weapon, the danger, the means used to produce or avoid death."

Does not the court mean to say, as a matter of law, that *intent is to be inferred or presumed* from the fact of shooting a gun loaded with shot, in shooting distance, at another, in the absence of all other facts? In any event, whatever may have been the views of the court on this point, they are not sufficiently expressed to justify us in overturning a doctrine which has had the sanction of the ablest judges and text-writers for more than a century.

The next authority relied on in the brief of counsel for defendant is a reference to 1 Bishop Crim. Law, § 514, treating of *attempts*.

The author, in § 248, treating "of what is a sufficient criminal intent," says: "The law presumes that every person intends to do what he does, and intends the natural, necessary, and even probable consequences of his act. Of course the *presumption of an intent* to do the act is always open to be rebutted by evidence; but when this *intent* is established, the deduction that the consequences were also intended is *generally*, not *always*, *conclusive*."

When the author comes to treat of "attempts" in the section preceding the one cited by defendant's counsel, § 513, he says: "We have already seen that every man is *presumed* to intend the natural, necessary, and even probable consequences of an act which he intentionally performs; and that, in some cases, *he is not permitted to deny this presumption*." The author illustrates this class of *conclusive* presumptions by referring to cases of libel, bawdy-houses, forgeries, false oaths, &c.; and adds: "Here, if a man intentionally does the thing, he cannot be heard to say, in his defense, that he did not intend the ulterior mischief." Immediately follows, § 514: "Then,

in considering *technical attempts*, the jury may take into view the nature of the act, as matter of evidence, in deciding upon the particular intent with which it was performed. *And they will be told by the court that the defendant should be presumed to have intended the natural and probable consequences of his act.* But they cannot go further. The doctrine of an *intent in law*, different from the *intent in fact*, is not applicable to these technical attempts; and the prisoner must be acquitted if his *real intent* were not, in fact, the same which is laid in the indictment." In other words, the author intends to say that "the doctrine" just spoken of in the previous section, 513, of *conclusive presumptions* of an intent in law excluding proof of the intent in fact, is not applicable to these technical attempts. The "legal fiction" or conclusive presumption of an intent in law, different from the real intent in fact, is not extended to technical attempts, made criminal by reason of the *special intent* with which the act is done. In this class of cases the presumption of law, which the author says "will be told by the court" to the jury, still remains; but it is only a *prima facie* presumption, not *conclusive and indisputable.* The jury may and should look into all the evidence in the cause, to see whether the *real intent* was different from that laid in the indictment; and if so, they should acquit. If, however, the evidence should disclose two or more intents, and among them the one charged in the indictment, he shows in §§ 249, 250, that the defendant should then be convicted of the one charged. It is most manifest, therefore, that Mr. Bishop, whose language is cited in other cases we shall presently notice, never designed to give his sanction to the doctrine contended for by counsel for defendant, but holds directly the opposite.

The next case cited in the brief of counsel for the defense, is the case of Ogletree v. The State, 28 Ala. R., 693. It is cited in support of the rule stated by Mr. Bishop in his work on Criminal Law, just considered at §§ 513, 514, and seems to be on this point entirely consistent with the views we have just expressed on that subject. The court says: "Whether he had that intent at the time of the alleged assault is a question of

fact for the jury to decide; and in deciding that question, *the jury ought to act upon those presumptions, which are recognized by the law*, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence."

The instructions of the court below on the point we have been considering, are in conformity with our views of the law, and are therefore not properly assigned for error here.

It is insisted that the second and sixth instructions given for the state "are erroneous, in holding that proof that the defendant assaulted his master in resistance of legal chastisement with a deadly weapon, made out a *prima facie* case against him, upon which the jury was as much bound to act as if it had been conclusive, unless that *prima facie* case were rebutted and overcome by the whole proof in the case."

The second instruction is in these words: "That malice is implied by law from the nature and character of the weapon used; and if the jury believe from the testimony that the master of the slave Jeff was about to inflict legal chastisement, and that Jeff resisted that legal chastisement, and made an assault upon his master with a deadly weapon, that this is *prima facie* evidence that he intended to kill his master; and the jury will find him guilty as charged, unless, from the whole proofs in the case, they are satisfied that he did not intend to kill."

The sixth instruction is as follows: "That when a *prima facie* case has been made out against the defendant, the jury are bound to act on that *prima facie* case, as much as if it were conclusive, unless that *prima facie* case is rebutted and overcome by the whole proof in the case."

These instructions are not liable to the objections made under the proofs in this case. They do not involve the question *as to changing the burden of proof*, nor do they exclude any fact in the cause from the consideration of the jury; but they leave the jury free to consider and decide the only point insisted on for defendant—and that is the main point charged in the indictment—whether he intended to *kill* deceased; and this they are to consider from all the proofs in the case.

We are satisfied, on the last ground, that the verdict is right, under facts appearing in this record.

Judgment affirmed.

JOSEPHINE (A SLAVE) v. STATE, 39 Miss. R., 613.

HOMICIDE.

Upon the trial of an issue of a plea of *autre fois acquit* to an indictment for murder by a jury, it is not necessary to ask them if "they have formed or expressed an opinion in regard to guilt or innocence of the prisoner." It is sufficient if they have not formed or expressed an opinion in regard to the question in issue.

The circuit court has no power to discharge a jury when *they say* that they cannot agree. But the court has the power to discharge them when there is a necessity for it, as where the term of the court was within a few minutes of its expiration when the jury returned into court and made known their inability to agree, and were discharged.

It is not necessary that there should be an *actual, positive, pressing necessity*, in order to give the court power to discharge the jury; it is sufficient if, in the opinion of the court, there is a *legal necessity* for so doing.

An erroneous ruling of the court, which, under the evidence of the case, could have no effect in procuring the verdict which is rendered, is immaterial, and, therefore, no cause for reversal.

The rule is well settled at common law, that when in an indictment for murder a person is charged as principal, the jury cannot convict such person as accessory before the fact. 1 Leach, 515; 1 East, 352; Rex v. Plant, 7 Carr. & P., 575; 12 Ala., 458.

Rev. Code, 44, art. 6, provides that no indictment pending before the adoption of the Code should be affected by its provisions not in force before its adoption. Therefore, Art. 2, p. 572, of the Code, which provides that "every person who shall be an accessory to any murder or other felony before the fact, shall be deemed and considered a principal, and indicted and punished as such, and this whether the principal has been previously convicted or not," does not apply to cases where the indictment was found before the adoption of the Code.

Where an instruction which is erroneous is given upon a material point in the cause, a judgment rendered in accordance with it will be reversed, unless it manifestly appear from the whole record that no prejudice was done to the party complaining, and that the judgment was clearly correct. *Semble:* Especially in cases of circumstantial evidence is this rule applicable.

On the trial of a slave for the murder of one of her master's family, it is competent for the state to prove by the master the prisoner's conduct and deportment towards witness, his wife, or his family; what she may have said expressing content or discontent towards him or his family, and of her situation, and condition of kindness or unkindness towards himself and family, and all acts of obedience or disobedience, subordination or insubordination, in the witness' family, to show the state of feeling of the prisoner, and as connected with the question of motive on her part to commit the deed charged against her.

Where there is no evidence tending to connect another party with the killing, and no fact going to show that such person had an opportunity to commit the act, testimony that such other person had made statements in relation to a previous poisoning, and her intention to commit the crime again, is clearly irrelevant, and should not be admitted. So also is a proposed examination of a witness as to his having had sexual intercourse with such other person.

On the trial of a slave for poisoning one of her master's family, it is competent for her to prove, in regard to the question of intent, that her master had been in the habit of sexual intercourse with her.

Statements made by the prisoner on the trial of another person charged with the same offense as himself, for which he is indicted, is not admissible in evidence against him.

The following entry on the minutes of the court: "The grand jury, elected, empaneled, sworn and charged at the present term of the court, this day returned into court the following bill of indictment:

THE STATE, vs. JOSEPHINE (a slave), GEORGE (a slave).	*Indorsed:* A true bill. James B. Smith, foreman of the grand jury. No Prosecutor."

Is sufficient to show that an indictment for murder, marked "filed," by the clerk, against the above named parties, and numbered and indorsed as above, was legally returned into court by the grand jury.

All objections to the indictment must be made before plea of "not guilty." Then, after the plea of not guilty has been entered, it will not be error for the court to quash an indictment for misjoinder of counts, or to refuse to compel the state to elect which count upon which to try the prisoner. George v. State, *supra*.

The statute Rev. Code, 250, which provides that in all cases not capital, slaves shall be tried by two justices of the peace and five slaveholders, does not apply to capital cases.

Error to Bolivar circuit court. YERGER, J.

At the May term, 1857, the plaintiff in error was indicted jointly with a slave named George, for the murder of Lelia Virginia Jones, by poisoning. The murder was alleged to have been committed on February 27, 1857. At the November term, 1857, of the court, the plaintiff in error was tried separately, and the jury failing to agree were discharged, and a mistrial entered by the court five minutes before the expiration of the term of the court prescribed by law. At that term another indictment was found against both George and plaintiff in error, upon which they were both subsequently tried separately. A *nolle prosequi* was entered on the first indictment in March, 1858.

The last indictment contained two counts. The first count charged plaintiff in error and George[1] (a slave) with the murder of Lelia Virginia Jones, by poisoning; and the second count charged Josephine as principal, and George as accessory before the fact. The prisoner filed to this indictment two special pleas in bar, which alleged a former discharge of the jury by the court, and a mistrial, and in the conclusion of both pleas, averred that such mistrial and discharge of the jury operated as an acquittal of the defendant from the charges alleged against her.

[1] See case of George v. State, *supra*.

Appended to these pleas was a certified copy of the first indictment against George and Josephine, and for which they were put on trial in November, 1857, and which was *nol. pros.* in March, 1858.

To these pleas the district attorney replied, denying that the defendant had ever been acquitted or put in jeopardy.

By consent of all the parties a severance was had.

At the November term, 1858, the plaintiff in error asked for a continuance, which was refused, and she excepted; and a trial was then had on the special pleas.

On the trial of these pleas the record of the proceedings in the former indictment was introduced by the prisoner, showing a regular indictment against her and George, in which she was described as a negress slave, for the murder of Lelia Virginia Jones, by poisoning; her plea of not guilty; the empaneling of the jury to try her on the 3d day of November, 1857; and the continuing of the trial, from day to day, till the seventh day of that month.

The record recites, that on the sixth day of the term, the jury "returned into court five minutes before twelve o'clock, P. M., and say they are unable to agree upon a verdict, and were thereupon discharged by the court, and a mistrial ordered to be entered in this case, and that the same be continued."

The following facts were then admitted by both the state and the prisoner: "That the prisoner is the identical person who was put upon her trial, as in the pleas filed is alleged; that the offense for which she was so put on her trial, is the same identical offense charged in the indictment under which the present trial is going on; and that the testimony on the former trial was the same, and in relation to the same offense, as that to be used upon the issue of not guilty under the indictment under which the present trial, at the November term, 1858, is taking place; that there are many races of pure African negroes who are of lighter complexion and more European cast of countenance than the prisoner."

Upon the trial of this issue, the defendant asked the court to instruct the jury as follows:

1. "That the discharging of the jury heretofore empaneled

to try the prisoner was illegal, if the jury believe from the evidence that the prisoner was so put upon her trial under a valid indictment, and could have been convicted upon any evidence which might have been introduced; and whether such evidence was or was not introduced on said former trial as immaterial, unless a necessity absolute for such discharge existed."

2. "That, in a capital case, the court has not the power to discharge a jury, after all the evidence is given, and the case closed and submitted to a jury, without their having rendered a verdict, upon the ground that the jury say 'they are unable to agree upon a verdict;' and such a discharge would operate as an acquittal of the prisoner."

"That the court has not the power to discharge a jury in a capital case, after the evidence is closed and the case submitted to them, unless such discharge is made upon some actual, positive, pressing necessity; and if such jury is discharged for any other cause, the prisoner is acquitted."

"That the mere fact that the term of the court was about to expire is not such a necessity as will justify the court in discharging a jury in a capital case, when the evidence for and against the prisoner is closed, and the case has been submitted to a jury to consider of their verdict."

"That it is within the judicial cognizance, and is true, that there are many races of African negroes who are of a lighter complexion and of more European contour of face than the defendant."

The court refused to give the charges as asked, but in lieu thereof gave the following:

1. "If the jury believe, from the evidence, that the defendant was put upon her trial for the same offense for which she now stands indicted, upon a good and valid indictment, under which she might have been convicted, and that the court, without a sufficient legal necessity, discharged the jury, then such trial and discharge of the jury, if made without such sufficient legal necessity, would operate as a bar to further prosecution under the present indictment, and they should find the issues for the defendant; but if the jury believe, from the evidence, that such discharge was made on a sufficient legal necessity, such dis-

charge would not operate as a bar to the further prosecution of defendant under the present indictment, and they should find the issues now before them against the defendant, and in favor of the state."

2. "In a capital case, the court has not the power to discharge the jury, after the evidence is given and the case closed and submitted to the jury, without their having rendered a verdict, upon the ground 'that they say they are unable to agree upon a verdict;' and such discharge upon that ground alone would entitle the defendant to a discharge, and would operate as an acquittal; but the court has the power to discharge the jury in such a case, where there is a legal necessity for so doing."

3. "The court has not the power to discharge a jury in a capital case, after the evidence is closed and the case submitted to them, unless such discharge is made on account of some legal necessity; and if the jury are discharged without such legal necessity, the prisoner would be entitled to a discharge, and could plead the same in bar of a further prosecution for the same offense."

4. "The jury are instructed that the fact that the term of the court was about to expire by limitation of law within a few moments, without the jury having agreed on a verdict, is such a legal necessity as will justify the court in discharging a jury in a capital case, when the evidence for and against the prisoner had been given, and the case submitted to such jury to consider their verdict."

At the instance of the state, the following instructions were given:

1. "In the trial of a criminal case for felony, although it be capital, the court trying the case has the power and authority, without the consent of the defendant, to discharge the jury empaneled to try the case, and order a mistrial to be entered in case of necessity. And if the jury believe, from the evidence, that on a former trial of the defendant in this case, on indictment for the same offense, the jury charged with the trial of the case did not and could not agree upon a verdict, and within five minutes or within a few minutes of the close and expiration of the last hour of the last day on which the court could legally

sit, appeared in court and reported to the court that they had not and could not agree upon a verdict in the case, and the court thereupon, and not until then, and because the term of the court was about to expire, and because the jury could not and did not agree upon a verdict within the time limited by law for the continuance of the court, discharged the jury, and directed a mistrial to be entered in the case, it would be such a case of necessity as the law contemplated for the exercise of the power to discharge the jury, and would be a sound and legal exercise of the discretion of the court; and such discharge of the jury and entry of the mistrial would not operate as an acquittal and discharge of the defendant, nor of putting of defendant in jeopardy of life or limb for the offense on which she was tried, so as to preclude and bar a subsequent trial on the same indictment, or a trial on the present indictment, though it be for the very same offense; and if the jury so find the facts to be on the present issues, they should find their verdict for the state and against the defendant."

2. "If the record of the former trial, read in evidence in this case, satisfies the jury that the court did discharge the jury charged with the trial of the indictment against the defendant for the same offense included in the present indictment, and order a mistrial to be entered, the law presumes that the jury are compelled and required to receive that record as conclusive evidence of the fact (if there be nothing in the record itself to contradict that presumption of law) that the court properly exercised its discretion, and that a case of necessity for the discharge of a jury had arisen; and such discharge would not operate to discharge the defendant, or bar a further prosecution for the same offense under the present indictment."

3. "If the jury believe, from the evidence in this case, that the court discharged the jury, on a former trial of this defendant, in a case of manifest legal necessity, even though they had agreed in their verdict, they must find the present issues for the state, and against the defendant."

The defendant proposed to ask each of the persons summoned to try the issues on the special pleas, "Whether he had formed

or expressed an opinion of the innocence of the said defendant of the crime of murder charged in the indictment?"

The court refused to allow that question to be propounded, but allowed the following question to be asked each of the jurors: "Whether he had formed or expressed an opinion in relation to the issues on the special pleas filed by defendant; and whether he had formed, or expressed, or held any personal bias, animosity, or ill-will, or good-will, to said defendant."

The state moved to empanel a jury to try all of the issues, as well that on the plea of "not guilty" as those on the special pleas filed by defendant; but on objection, this course was not allowed, and a jury was empaneled to try the issues of the special pleas.

The verdict on the issues was for the state.

At the October term, 1859, the prisoner moved the court to quash the indictment, for misjoinders of counts. The motion was overruled, and the prisoner then moved the court to compel the district attorney to elect upon which of the counts in the indictment the state would rely upon for trial. This motion was also overruled, and exception taken.

Afterwards, at the same term, the defendant moved the court to quash the indictment because no prosecutor's name was marked upon it, it appearing from the indictment that the offense was committed on the 27th of February, 1857, before the Revised Code, which allows indictments to be returned without a prosecutor, went into operation. This motion was also overruled, and exceptions taken.

At the April term, 1861, the defendant was put on her trial on a plea of "not guilty." She objected to go to trial, because a list of the special *venire* and a copy of the indictment had not been served on her, as the law directs. This objection was overruled. She then applied for a continuance, which was refused. She then moved to quash the special *venire facias*, which was refused. She then challenged the array of the panel summoned on the special *venire facias*. The challenge was overruled. She then asked leave to file a plea in abatement to the special *venire*, which was refused. The grounds upon which these pro-

ceedings were predicated need not be set out, as this court expressed no opinion in reference to them.

After the jury was empaneled, the district attorney proposed to read the indictment to the jury, and the defendant objected, because there was no record of this court of the finding and return of said indictment, and because the record is insufficient and uncertain, &c. [This objection was the same as that made on the motion in arrest of judgment, and the proceedings connected therewith will be hereinafter fully set out in connection with the said motion in arrest of judgment.] The objection was overruled, and defendant excepted.

The state then introduced Lafayette Jones, who testified as follows: That Josephine was his slave; that on the 27th December, 1857, witness and his wife and little daughter, Lelia Virginia, about fourteen months old, and his son and a Mr. Forbes, ate dinner at witness' house. There was tea for dinner. Witness' wife poured out a cup of tea, and handed it to the nurse for the little daughter, who drank of it, and witness and witness' wife also partook of the tea; but his son and Forbes did not. Before the child Lelia Virginia finished drinking the tea, she commenced vomiting. Witness took the child into another room, and then commenced vomiting himself. Witness became alarmed, and immediately took the teapot and locked it up in the parlor. On a former trial witness had forgotten what he did with the teapot. After witness' wife commenced vomiting, he sent for the overseer, and told him to arrest Josephine, which he did, and tied her and put her in a room. Shortly after witness sent for overseer, was taken very sick, and vomited a great deal. Witness soon after went to bed, and don't know what took place afterwards, except that the child kept vomiting. Dr. Mason was called in to attend to the child, Mrs. Jones, and witness. Forbes and witness' son, who did not partake of the tea, were not sick. Witness does not know who cooked dinner that day; the food on the table was such as was commonly on at dinner. Prisoner was in the kitchen that day, and had been in it for several days as cook.

Witness had bought her in New Orleans, about two weeks before that time. Witness had whipped Josephine on that

morning (27th February, 1857), for some illegal impudence to Mrs. Jones.

The court permitted witness, against the objection of defendant, to testify "that at the trial of George under the present indictment, Josephine testified as a witness, and then and there stated that, when she was coming up from New Orleans on the steamer Ingomar, she took from a girl on the boat some free papers." Defendant excepted.

The state then asked the witness, "What was the conduct and manner of Josephine from the time he bought her in New Orleans up to 27th February, 1857?" Defendant objected to the question. The court overruled the objection, holding that the state might ask the witness about the general and particular conduct of prisoner towards witness or his wife or family from the time he bought her till the 27th February, 1857; and also might ask witness what the prisoner said during that time, expressing content or discontent towards him or his family, "or about her situation and condition, or kindness or unkindness towards himself or family;" and as to all acts of obedience or disobedience, subordination or insubordination, towards witness or his family, or their orders or commands. To this ruling defendant excepted.

Witness then, under said ruling, stated that after he bought her in New Orleans, she manifested an unwillingness to leave that place, not by any word or words, but by crying and "taking on considerably." Upon being asked what was the matter, she said some of the negroes in the yard had stolen some of her jewelry. Witness and Josephine came from New Orleans on different boats. Witness can't say that he ever heard her say or saw her do anything to make witness believe that she was dissatisfied. She did not move about witness' house with the life and sprightliness she did in New Orleans. Witness whipped defendant after breakfast that morning (27th February, 1857). She appeared vexed about the whipping, throwing her head around to her shoulder to see a cut made by the whipping. Witness don't know whether he whipped her with a cowhide or switch.

Cross-examined.—George, jointly indicted with Josephine,

and two little negroes and prisoner, were at witness' house on 27th February, 1857. George was working about the yard.

Witness employed counsel to prosecute defendant, viz., Gov. F. and Messrs. B. & S., and to defend George.

Witness' wife treated Josephine kindly. Defendant never disobeyed witness. The inclosure around witness' house includes less than an acre. George was working about the yard-fence the day of the poisoning, his (George's) house being near the fence. George had been an invalid (from rheumatism) for twelve or eighteen months prior to that time. A few days previously witness had told the overseer to make George go to laying off corn-rows with a plow. George was without a wife at the time. He once had Becky for a wife, and she was then on the place.

Witness then owned a slave named Elsey, whom he had owned since 1838. She was then on the place, and had been witness' cook; and had been turned out into the field but a short time before the 27th of February, 1857. Elsey was mother of witness' slave Lethe, who was mother of a mulatto child about eighteen months old on 27th February, 1857. Lethe was then on the place.

Witness then owned and had on his place a slave (mulatto) aged about twenty years, named Eliza, who is a witness in the case.

Witness does not remember saying he would spend half of his fortune to convict defendant.

Witness never whipped her but that one time: the whipping was not severe. Witness was married to his present wife in Madison parish, La., in 1855.

Witness was then asked by defendant, "Did you, shortly after your marriage to your present wife, and whilst in Madison parish, have the woman Elsey, your slave, and the woman slave of yours above spoken of by you, arrested and tied, and so kept for several days, upon a charge made by you that she had poisoned your first wife, and that Elsey had said shortly before she had been arrested, "I have put my first mistress under the ground, and will soon put the new one there;" and had you so kept her tied, deliberating whether or not you should deliver them to the officers of the law for prosecution?"

"Have you, before the 27th February, 1857, for some years been in the habit of sexual intercourse with the said woman Lethe, the daughter of Elsey, and are you the father of her mulatto child?"

"Have you, before the 27th February, 1857, for some time been in the habit of sexual intercourse with your said slave Eliza, who is to be a witness in this case?"

"Did you, in New Orleans, and on the afternoon of the day before the day you whipped defendant as aforesaid, have sexual intercourse with her?"

To which several questions the state objected. The court sustained the objection, and defendant excepted.

Mrs. Lafayette Jones, for the state, testified that breakfast was cooked badly on the morning of the 27th February, 1857, and she talked mildly to defendant about it, who replied impudently and saucily. She informed her husband of this impudence, and he whipped her. Shortly afterwards witness went to the kitchen and called defendant. She did not reply, and turned her back on witness, and made a face at witness, and turned over a chair. Witness then procured the overseer to whip her. In an hour or two afterwards witness went to kitchen and asked prisoner to go with her to the smoke-house to get out dinner, which she did, and then seemed to be in a good humor. At dinner, tea was on the table, and it was drunk by witness' daughter, Lelia Virginia Jones, and by witness, and Mr. Jones. The daughter was about twelve months old, and in good health. Before dinner was over the child commenced vomiting, and so continued for several hours, when she died. Witness tried to give her oil and milk, but she was so sick, and vomited so much, that she could not swallow them. The child vomited up a frothy matter. Witness soon after dinner became sick herself, and vomited a great deal. Witness did not recover from her sickness for two years. Witness had cramp in her stomach after taking the tea, and great thirst.

Defendant was cook, and had been for a week. There was no other cook there while she was in the kitchen. The kitchen was ten or twelve steps from the house. It could not be seen from the witness' room, but could be seen from the gallery

Cross-examined.—Mary (a slave) was sick in her bed at some distance from the kitchen. She had been taking medicine that day. Witness waited on her; no one else stayed with her. Some of the negroes—Tom (Mary's husband), Charles, and Rose—stayed in Mary's house. On that day the negroes were planting potatoes up the river, above and joining the garden, which is square, and contains less than an acre of ground, and adjoining the yard, which is also small, and contains less than an acre. Elsey and Lethe were planting potatoes with the other negroes.

Witness gave prisoner five new dresses—four of calico and one of lawn. Witness had tea frequently for dinner, but did not order it that day. When witness wanted tea it was always ordered. George and Forbes had been working near the house. Don't recollect to have seen George about the kitchen that day.

Dr. C. R. Mason, for the state.—Is a practising physician, and has been for seven years, and is a graduate of a medical college. When he arrived at Jones' on 27th February, 1857, his child, Lelia Virginia Jones, had thirst and spasmodic action of the extremities. Jones complained of dryness about the mouth, thirst, and vomiting. Mrs. Jones was "more mentally excited than otherwise." Witness thought from the symptoms the family were poisoned with arsenic, and such is his opinion as a medical man; and he treated them accordingly. The child died about an hour after witness arrived.

The admissions made by defendant were excluded because they were procured upon his assurance that if she would tell all she knew of the matter, witness would get her off on a steamboat; but he was permitted to state, and did state, that being in the room where the prisoner was confined, he went with her to Forbes' room by her direction, and there in the ashes found a fragment of a glass vial partly fused by heat. He could not tell from said fragment the size of the vial of which it was a part. It appeared to have been a part of a small vial, or it might have been a part of a four-ounce vial. Did not know such fragment was in the fire-place before.

Cross-examined.—There are many diseases, the symptoms of which closely resemble those of poisoning by arsenic, such as

gastritis, *gastro-enteritis*, and Asiatic cholera. Cannot say positively that Jones' family were poisoned, but think they were, and with arsenic.

Eliza (a slave), for the state.—She is a slave of Lafayette Jones. Witness was, on the day of sickness or poisoning, at work in the field, picking up corn-stalks. On the Monday or Tuesday night before the poisoning, George was looking in his chest for tobacco, and took out a vial, which he said he had a long time, and gave it to Josephine. He said it was ratsbane or strychine, or something that would kill rats, and that he had no use for it. Prisoner said, "Give it to me," and thanked him for it, and put it in her pocket, and tried to read what was on it, but could not make out all the letters on it. Witness cooked her supper in George's house, and then went to her mother's house. George and Josephine were all that slept in that house. George did not say where he got the vial.

Cross-examined.—When George was looking into his chest, he said the overseer had told him to go to laying off corn-rows to-morrow, and he was not able to do it, and wouldn't do it, and that his master was getting tighter on him than he ever had been. That the vial was about as long as witness' finger, and not so thick; it was white, and had something white in it, which looked like flour. The above conversation was on Monday or Tuesday night, and the poisoning in the latter part of the same week. Witness never had a quarrel with the prisoner. Witness only stayed in George's room that night long enough to cook her supper, and then left, leaving George and Josephine there. Witness never had talked with any person, or with any of the negroes, about the poisoning or the vial, from that time to this.

George, a slave, and jointly indicted with defendant, and under sentence of death for said offense, testified for the state that he was hunting for some tobacco in his chest, and took out a vial and put it on the floor. Josephine says, "What is this?" and took it, and nothing more was said about it. Witness found the vial in the mud in an overflow in Louisiana, where he was picking up some plows to put into an old storehouse. The vial was about two inches long and about one and a quarter inches

thick. Witness told Josephine he did not know what was in the vial, but it was "some medicine or stuff." Eliza was then holding a pine-torch for me. The night before the poisoning the witness was lying in his bed and awake, and he heard Josephine and Charles talking, while sitting on a chest on the outside of his house, about how they would get off. There was nothing between them and witness but a single-plank wall. Charles said he did not know how to fix the papers, and Josephine said she would have them fixed, and they would get a skiff and go to Napoleon, or go up the river. Witness did not see Josephine build a fire in Forbes' room on the day of the poisoning, but saw some chips there like some she had carried in from the wood-pile. When the lamentation was going on in the house, witness was at work in the yard, near the wood-pile, fixing up the palings. Charles was going towards the horse-lot, and defendant coming behind him; she said, "Charles, now I have ruined myself;" and he said, "Yonder's the overseer," pointing backward, and then she stooped down to pick up some chips. Witness did not see where she went, but saw the chips afterwards in Forbes' room.

Cross-examined.—When witness saw Charles tell Josephine "Yonder's the overseer," Charles was coming from the horse-lot, she was following him, and the overseer behind her, coming towards her. Witness was then outside the gate, in the lane, and was mending palings. Witness had not been in the kitchen that day but once, before the family took sick. He had been at the door, or put his foot on the door-sill, but did not go in. He did not know what was in the vial. That he had not recently, before 27th February, 1857, been sick, but was then well, and able to do most any kind of work; could work about heavy timbers. He had not worked in the field for some years.

Abram (a slave of Lafayette Jones) testified that on the morning of the 28th of February, 1857, he was in the room in which defendant was confined, and guarding her; he was holding the rope with which she was tied. Becky and Rany (two slaves of Jones) were in the room talking to prisoner, and asking her what made her do so. Becky was talking considerably in a loud tone to prisoner. Several of the negroes were in the adjoining

room, talking loud and making much noise. Becky was shaming prisoner for having done what was done, and prisoner said, "For God's sake, hush, people. You make more fuss about it than the white folks do. I am not the first one that did such a crime, by ten thousand." The negroes of the plantation were about the house and in the yard on the evening of the 27th February, 1857. There was much confusion that evening; all the doors were open and fires were in the rooms. Prisoner, when she said as above, "For God's sake," &c., was crying, and stopped crying to make the remark.

Raney (slave of L. Jones), for the state, proved on her direct examination the same facts stated by Abram, the last witness; but on cross-examination, she stated that the remark made by prisoner, "For God's sake," &c., as above testified, was in these words: "For God's sake, people, hush. *Even* if I had done it, I am not the first one that has done such a crime, by ten thousand." Witness further stated she was the wife of witness Abram, and on the day of the poisoning she was in the field plowing, the trash-gang picking up corn-stalks. The field-hands were not allowed to go about the kitchen.

Austin Dixon was then sworn for the state. Witness was overseer for L. Jones in 1854 and 1855, in Madison parish, La., and had under his charge, as such, slaves George, Elsey, and Lethe; that George, in 1854, showed witness a small vial, in which there was a white powder, and told witness he had found it on the road between Dallas and Jones plantations, which were six or seven miles apart.

Defendant proposed to question the witness in relation to the arrest by Jones of Elsey and other negro women on the charge of poisoning his first wife, and also the declaration made by Elsey on that subject, as she had proposed to examine said Jones; but on objection of the state, the court decided the testimony incompetent, and defendant excepted.

The state then proved by Joseph McGuire and his wife that the teapot used at dinner at Jones', on the 27th February, 1857, had been carefully preserved by them till June, 1860, when it was delivered by McGuire to Professor W. D. Moore, of Oxford.

Professor Moore stated that he had made an examination of said teapot so delivered; that there was then no fluid or tea-grounds in it, but there was a greenish brown crust on the bottom and part of the sides of said teapot; that, on submitting this crust to proper chemical tests, he procured the pure metal, arsenic, and then procured from the said pure metal octahedral arsenical crystals, or crystallized arsenic. Witness is a scientific chemist.

Defendant then proved by Joseph C. Rogers that he had been acquainted with her many years in Paducah, Kentucky; that she had been nurse in the families of witness' brother-in-law and father-in-law for some years, and that her character for kindness, humanity and amiability was good.

Charles (a slave of L. Jones), for defendant.—The witness denied the conversation testified to by George as having taken place between witness and defendant on the night before the poisoning, on the chest near George's house, and also denied the conversation to have taken place on the day of the poisoning at the wood-pile.

It was admitted that witness George had been convicted under the indictment, and that said conviction was affirmed by this court, and that he was under sentence of death under said conviction.

This was all the evidence.

The court, at the instance of the district attorney, instructed the jury as follows:

1. "That a person charged with crime may be convicted on circumstantial evidence as well as on direct and positive testimony. Great care and caution should be used by the jury in the investigation of such evidence. But where, after due care and caution in the investigation of circumstantial evidence, a full conviction of the minds and consciences of the jury of the guilt of the accused, to the exclusion of all reasonable doubt, is produced, the law authorizes, and they are warranted in acting upon it."

2. "Circumstantial evidence which satisfies the minds and consciences of the jury to the exclusion of all reasonable doubt is sufficient to justify conviction. Absolute, demonstrative cer-

tainty is not essential to proof by circumstances. It is sufficient if the circumstances produce moral certainty, to the exclusion of all reasonable doubt. The legal test of the sufficiency of evidence, either circumstantial or direct and positive, to authorize a conviction, is its sufficiency to satisfy the understandings and consciences of the jury, to the exclusion of all reasonable doubt, of the prisoner's guilt."

3. "To authorize the jury to find the defendant guilty of the crime charged, there should be evidence before them sufficient to satisfy their minds of her guilt beyond a reasonable doubt, arising from the evidence in the case. That which amounts to mere probability only, or conjecture, or supposition, is not what the law means by such a reasonable doubt as the jury would be warranted in giving the defendant the benefit of, and acquitting her upon the doubt. A doubt which should properly induce them to withhold a verdict of guilty, should be such a doubt as would reasonably arise from the evidence before them."

4. "That the laws of this state, and the laws which are to govern them in their investigation of this case, make all accessories before the fact to the commission of murder, principals, and punishes them with the same penalties imposed on principals. What the law means by 'an accessory before the fact,' is one who has guilty knowledge, and aids, assists, or abets another in the commission of a felony."

5. "That if the evidence in this case satisfies the jury, beyond a reasonable doubt arising therefrom, that the defendant, Josephine, administered arsenic, or had a guilty knowledge of, and aided, abetted, or assisted in the administration of arsenic, knowing the same to be poison, to Lelia Virginia Jones, and that the said Lelia Virginia Jones died from the administration of the same, as the indictment charges, the law presumes, from the act of the administration of poison by defendant, or her guilty knowledge of, and the aiding, assisting, or abetting of the administration of the same by any one else, so proven, that the defendant was actuated thereto by the motive of wilful malice (one of the essential ingredients of the crime of murder), and they should find the defendant guilty, as the indictment charges."

6. "That if the jury are satisfied, from the evidence in the case, that the defendant was guilty of the act of the administration of the arsenic, or aided in the administration of the same as an accessory, before the fact, to Lelia Virginia Jones, knowing that that arsenic was poison, the law presumes that her motive was malicious; and in order to warrant her conviction, the jury are not required to search the evidence before them for any other motive but her act or participation in the crime charged."

In the seventh instruction the jury were charged, that the prior conviction of George was no evidence of prisoner's innocence; that it only established the guilt of George as one of the principals or accessories before the fact, of said crime; and that if they were satisfied, beyond all reasonable doubt, that the said murder was committed by defendant and George, as principals, or by defendant as principal, and George as accessory before the fact, or George as principal, and defendant as accessory before the fact, they should convict.

The following are the instructions as asked by defendant, and as modified and given by the court:

1. "That, of all kinds of evidence, that of extra-judicial and casual declarations is the weakest and most unsatisfactory, and requires the greatest care in examination and application by the jury. This caution is to be particularly exercised where the party making proof of such declarations is known to have been influenced by angry feelings towards the defendant, or where the credit or reliability of the witness is impeached, or the time at which such declaration is made is remote."

In lieu of this, the court gave the following:

"That extra-judicial admissions or confessions are competent testimony for the consideration of the jury, as well in civil as in criminal cases. The jury, however, are to exercise the greatest care and caution in their examination and application. This care and caution should be particularly exercised where the proof in the case before them shows that the party proving such declarations, admissions, or confessions, is influenced by angry or unkind feelings towards the party charged with making such declarations, admissions or confessions, or when

the credibility or reliability of the witness testifying to them is impeached by testimony in the case; *or* the nature and character of the admissions, declarations and confessions, or the facts and circumstances attending their making [This last sentence seems to be incomplete.—R.], or when the time at which they were made is remote."

2. "In the application of circumstantial evidence to the determination of the case, the utmost caution and vigilance should be used. It is always insufficient when, assuming all to be proved which the evidence tends to prove, some other hypothesis arising and growing out of the evidence in the case may still be true; for it is the actual, positive and absolute exclusion of every other hypothesis arising and growing out of the evidence in the case, which invests circumstances with the force of proof in the particular case."

Instead of this, the court gave the following:

2. "In the application of circumstantial evidence to the determination of a case, the utmost caution and vigilance should be used by the jury. It is always insufficient when, assuming all to be proved which the evidence tends to prove, some other reasonable hypothesis arising and growing out of the evidence in the case than the one sought to be established by the evidence may be true. It is the absolute, positive exclusion of every other reasonable hypothesis arising and growing out of the evidence in the case, than that sought to be established by it, that will authorize the jury to act upon it, and give to circumstances the force of truth in the particular case. But, whenever, after due care and caution in the examination of circumstantial evidence in a criminal case, a full conviction on the minds and consciences of the jury of the guilt of the accused, to the exclusion of all reasonable doubt arising from the evidence in the case, is produced, the law authorizes, and the jury should act upon it. Absolute, demonstrative certainty is not essential to proof by circumstances."

3. "In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts (facts showing guilt) must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon

any other reasonable hypothesis than that of the guilt of the accused."

This instruction was modified by the court by inserting after the words "reasonable hypothesis," the following: "arising from the evidence, or growing out of the proof in the case."

4. "The circumstances alleged as a basis of any legal inference, must be proved beyond doubt to exist, and must be shown indubitably connected with the main facts to be proved."

This instruction was thus modified:

4. "The circumstances alleged as the basis of any legal inference must be proved beyond doubt to exist, and must be shown by proof, satisfactory to the jury, to establish the main fact sought to be established by them, to the exclusion of all reasonable doubt arising from the evidence in the case."

5. "Before the jury can rightfully find the prisoner guilty, on circumstantial proof, that proof must be so absolute, conclusive, positive, and certain, as to exclude from their minds every other reasonable doubt that the crime may have been committed by some other person than the prisoner."

This instruction was modified by striking out "other," before "reasonable doubt," and inserting after those words, "arising from the evidence in the case;" and by adding to the instruction, "unless the proof satisfies the jury that such person was jointly concerned with the prisoner in the perpetration of the crime charged, or was accessory before the fact to its commission, or aided, abetted, or assisted in its commission."

6. "The probability of the prisoner's innocence, arising from the evidence, is a legal foundation for a reasonable doubt of his guilt."

This instruction was modified, by inserting "mere" before "probability," and appending to the charge "but a possible conjecture or supposition is not."

7. "To justify a conviction upon circumstantial evidence, it is necessary that the circumstances should be such as to exclude, to a moral certainty, any reasonable doubt of the prisoner's guilt."

This instruction was modified by appending "arising from the evidence in the case."

8. "If the evidence in the case leaves it indifferent which of several hypotheses, arising and growing out of the evidence in the case, is true, or merely establishes some finite probability in favor of the hypothesis of guilt, rather than another, such evidence cannot amount to legal proof of guilt, however great the probability may be."

9. "If the jury have a reasonable doubt whether the prisoner feloniously administered poison as charged, they must acquit."

This was modified by inserting after "reasonable doubt" the words, "arising from the evidence in the case."

10. "If the jury have a reasonable doubt whether the child Lelia died from the effects of poison feloniously administered by prisoner, or whether the child died from disease, or of accidental poisoning, they must acquit the prisoner."

This charge was modified as follows, by inserting after "reasonable doubt" the words, "arising from the evidence," and after the words "administered by the prisoner" inserting the words, "or by some one else, with her knowledge, connivance, assistance, and consent."

11. "If there is any fact established by the evidence irreconcilable with the guilt of the prisoner, although all the other facts and circumstances of the case may coincide and agree with the guilt of the prisoner, the jury will acquit the prisoner."

This was given as asked.

No instruction marked 12 is in the record.

13. "If, upon the testimony, the jury entertain a reasonable doubt whether there was arsenic in the tea which was used by the child at dinner, then, unless from the testimony the jury believe there was in said tea some other deadly poison, which was feloniously placed there by the prisoner, and so believe beyond a reasonable doubt, they will find the prisoner not guilty."

This instruction was modified by inserting after the words, "placed there by the prisoner," the words "or some one else by her aid, assistance, and connivance;" and inserting after the words "reasonable doubt," where they last occur in the instruction, the following: "arising from the evidence in the case."

14. "The *corpus delicti;* that is, the commission of the

offense, in this case is not merely the fact that the child died, but the death, and the fact of her death by poison feloniously administered, constitute the *corpus delicti;* and if the jury are not satisfied from the evidence in the cause, beyond a reasonable doubt, of the *corpus delicti* (that is, that poison was feloniously administered to the child Lelia, and that said child died from the effects of said poison so administered), they must find the prisoner not guilty."

This was given as asked.

15. "In criminal cases the mere union of a number of circumstances, each of which is inconclusive in its nature and tendency, cannot afford just ground of conviction, unless the combination be conclusive."

This was modified to read as follows: In criminal cases the mere union of any number of circumstances, each of which is inconclusive in its nature and tendency, cannot afford just ground for conviction, unless, when united and combined, they satisfy the jury of the guilt of the party charged, to the exclusion of all reasonable doubt. In such case they will afford just ground for, and authorize, a conviction of the party charged."

16. "Evidence of good character should uniformly have the effect to outweigh and overcome the mere testimony of an accomplice."

Modified so to read as follows:

"The evidence of good character of a prisoner should outweigh the evidence of a party charged as an accomplice, unless the evidence of such accomplice be sustained by the facts and circumstances proved by other testimony in the case."

17. "If the jury believe the testimony of the boy George is contradicted in any of its material parts by other unimpeached witnesses in the cause, it is their duty to disregard such parts of George's testimony, and they may in such a case disregard all his testimony."

Modified to read as follows:

"If the jury believe the testimony of the boy George is contradicted in any of its material facts by other unimpeached witnesses in the cause, they should disregard it, unless the facts

and circumstances proved in the case, or the evidence of other unimpeached witnesses, sustain and corroborate it. The jury are the judges of the credibility of his evidence, and may, if they believe it, act on it; or if they disbelieve it, may disregard it; or they may act on a part and reject a part, as they may think the facts and circumstances of the case, and the testimony in the case, warrant."

18. "The jury must discard absolutely from their minds every impression arising out of any thing, or act, or knowledge, except that derived solely from the evidence admitted by the court, and not from any impression derived from matters excluded by the court from them, upon objection thereto by counsel."

This was given as asked.

The verdict was, "Guilty as charged in the indictment."

The prisoner made her motion in arrest of judgment, upon the following grounds:

1. "That the record does not show that any indictment was ever returned and presented in the court against her and said George, or against her, by the foreman of a grand jury, in presence of twelve of the grand jury, including such foreman."

2. "The record shows no return of presentment of an indictment in this court against this defendant, or against this defendant and any other person, for the murder of any particularly named individual, or of any unknown person."

3. "The pretended indictment on which this defendant was tried, if it ever were found and returned in any manner to this court, was so returned while defendant was in custody of the sheriff of Bolivar county; and that said defendant has been in custody of said sheriff from the 4th day of March, 1857, until the present time, continuously."

The court overruled the motion, and pronounced judgment. The defendant excepted, and sued out this writ of error.

F. Anderson and *George V. Moody*, for plaintiff in error.

1. The act of the legislature of November, 1857, passed after the commission of the offense, making an accessory before the fact indictable as principal, does not apply to this prosecution. See on subject of retrospective and *ex post facto* laws, the fol-

lowing authorities: Sedgwick on Stat. and Const. Law, 191-196; Rev. Code, p. 44, art. 6; Id. p. 572, art. 2; Boyd v. Barringer, 23 Miss. R., 270; Garrett v. Beaumont, 24 id., 377; Dash v. Van Cleek, 7 Johns., 477; Calder v. Bull, 1 Cush. U. S. R., 271-273; 1 Kent Com., sec. 19, p. 381; Strong v. The State, 1 Blackf., 195, 196; Watson v. Mercer, 8 Peters, 110; Story on Const., sec. 1345; 1 Russell on Crime, 30, 31.

2. "The motion to quash the *venire* should have been sustained; so ought the challenge to array; and the plea in abatement to the *venire* should have been allowed." Rev. Code, p. 501, art. 142; Id., p. 613, art. 250; Id., p. 499, 500, art. 135-139; Woodsides v. The State, 2 How., 655; 1 Chitty Crim. Law, 537.

3. Prisoner's application for a continuance should have been granted. McDowell v. The State, 8 S. & M., 401; Franks v. Wangar, 25 Miss. R., 121; Weeks v. The State, 31 id., 500; Ogle v. The State, 33 id., 387.

4. On the question arising on the admission of the evidence of Jones as to what Josephine swore on the trial of George, and his evidence of her conduct, general and particular, towards his family; her acts of kindness or unkindness, obedience or disobedience, &c., see Dayson v. The State, 26 Miss. R., 362; Bowels v. The State, 24 id., 456; 2 Russell on Crime, p. 722, *et seq.*; Torrence v. Fisk, 10 S. & M., 595; Lake v. Munford, 4 id., 319; Dougherty v. Vanderpool, 35 Miss. R., 165; Dunlap v. Hearn, 37 id., 475; 1 Arch. Crim. Law (Watterman's notes), 393-395, 411; Id., 120, *et seq.*

T. J. Wharton, attorney general.

HANDY, J.:

The plaintiff in error was indicted at the May term, 1857, of the Bolivar circuit court, jointly with a slave named George, for the murder of Lelia Virginia Jones by poisoning, alleged to have been committed on the 27th February, 1857. At the November term, 1857, the plaintiff in error was put on trial separately; and after the testimony was closed, and the case submitted to the jury, and they had deliberated of their verdict,

they returned into court five minutes before the expiration of the last hour of that term of the court, and stated that they were unable to agree upon a verdict; and they were thereupon discharged by the court, and the case continued. At that same term another indictment was found against the parties for the same offense, and upon this they were tried separately, and at May term, 1861, the plaintiff in error was convicted, and the judgment rendered, which is now sought to be reviewed by this writ of error, a *nolle prosequi* upon the former indictment having been entered at March term, 1858.

This indictment contains two counts; the first charging Josephine and George as principals in the commission of the offense, and the second charging Josephine as principal and George as accessory before the fact. Various exceptions were taken, in behalf of the plaintiff in error, to the rulings of the court on the trial, and also to the overruling of her motion for a new trial, and of a motion in arrest of judgment.

The errors assigned are very numerous, and we will proceed to consider such of the assignments as are necessary and proper for us now to determine.

We will first consider the assignments of error having reference to the trial of the special pleas, which set up the trial at November term, 1857, and the discharge of the jury by the court, without their having found a verdict, as a bar to the second indictment, which was for the same offense, and relied on that trial as an acquittal. On the trial of the issue made by these pleas, the prisoner proposed to interrogate the jurors summoned to try them, whether they had formed or expressed an opinion of the guilt or innocence of the prisoner of the crime of murder, as charged in the indictment; but the court refused to allow the questions to be propounded, and allowed questions to be put to the jurors, whether they had formed or expressed an opinion in relation to the issues made by the special pleas, and whether they had expressed or held any personal bias, animosity, or ill or good will to the defendant. To this ruling the prisoner excepted, and now assigns it for error.

It is very clear that the ruling was correct. The office of the jury in this matter was to try issues wholly distinct from the

question whether the prisoner was guilty or innocent of the crime charged in the indictment. It was a single and separate issue, upon the determination of which it cannot be presumed that any prepossessions they may have entertained in relation to her guilt or innocence of the crime of which she was charged could influence their minds. To such a case, the examination of jurors, which prevails in practice in capital cases in this state, has no application.*

Again, it is assigned for error that the court refused to give the instructions asked in behalf of the prisoner on the trial of the special issues, and that the court gave instructions in lieu of those which are alleged to be erroneous.

The first and second instructions, as asked for the prisoner, were substantially given in the first and second instructions given by the court, and in a more accurate and intelligible form for the direction of the jury. The third, as asked for the prisoner, states that the court has not the power, in a capital case, to discharge the jury after the evidence is closed, and the case submitted to the jury, and no verdict is rendered, upon the ground that the jury say that they are unable to agree on a verdict, and such a discharge would operate as an acquittal. The instruction granted in lieu of this states, in substance, that, under such circumstances, the court has not the power to discharge the jury upon the ground that *they say* that they are unable to agree upon a verdict, and that such discharge, upon that ground alone, would entitle the defendant to an acquittal; but that the court has the power to discharge the jury in such case, when there is a legal necessity for so doing. This qualification was not only more correct, as a general rule, than that asked in behalf of the prisoner, but it was more applicable to the state of evidence touching the question before the jury, which showed that the discharge was a matter of necessity, inasmuch as the term of the court was within a few minutes of its expiration when the jury returned into court and made known their inability to agree, and were discharged.

The fourth instruction states that, under the circumstances set forth in the first instruction, the court has no power to dis-

* Wharton Am. Cr. Law, 3015, and cases.

charge the jury, unless on account of some "*actual, positive, pressing necessity.*" These terms are objectionable, because they were calculated to mislead the jury when applied to the circumstances of the case before them. The court, therefore, properly qualified the instruction by using the words "unless on account of some *legal necessity.*"

For the same reason, the fifth instruction was properly refused. It states that the mere fact that the term of the court was about to expire was not such a necessity as would justify the court in discharging the jury. The court, on the contrary, instructed that the fact that the term of the court was about to expire within a few moments, without the jury having agreed, or being able to agree, on a verdict, was such a legal necessity as would justify the discharge of the jury. This was correct as a legal rule, and it was plain and pertinent to the evidence upon which the jury had to act.

The first and third instructions given at the instance of the state contain a more full reference to the circumstances of the discharge of the jury, as shown by the evidence, and are manifestly correct.

But it is insisted that the second instruction in behalf of the state is erroneous, in directing the jury that if the record in evidence satisfied them that the court discharged the jury on the previous trial of the prisoner, and ordered a mistrial to be entered, that record is conclusive evidence (if there be nothing in the record itself to contradict the presumption) of the fact that the court properly exercised its discretion, and that a case of necessity for the discharge existed, &c.

If it were conceded that this instruction is not correct in stating the legal presumption in favor of the act of the court, and the force and effect of the record, yet it would not be error of which the plaintiff in error could complain, since the statements of the record are amply sufficient to justify the action of the court in discharging the jury, and there was no evidence adduced tending in any degree to impair or destroy the force of the facts stated in the record, or of the act of the court in discharging the jury. Hence, under such circumstances, it was immaterial that the court instructed the jury as to the conclu-

sive character of the record; for it was, of course, conclusive when there was no evidence offered to impeach it, whether such evidence would have been competent or not, if offered; and the instruction did no prejudice to the plaintiff in error.

The next assignments of error which we will consider are those relating to the instructions given at the instance of the state, and those asked in behalf of the prisoner, and either refused or modified.

The principal ground of error in these instructions insisted on, is those parts of the fourth, fifth, sixth, and seventh for the state, which hold that if the jury were satisfied from the evidence that the prisoner was an accessory before the fact in the commission of the crime charged, they should find her guilty as charged in the indictment. This qualification was also added by the court to the fifth, tenth, and thirteenth instructions given by the court, by way of modification of the instructions asked in behalf of the prisoner.

It will be observed that the prisoner was charged in both counts of the indictment as principal, and not as accessory; and the question is, whether it was competent to find a verdict of conviction against her under this indictment, if the jury should be satisfied from the evidence that she was guilty as accessory before the fact.

The rule is well settled at common law that this could not be done. Rex. v. Winfried and Thomas Gordon, 1 Leach, 515; 1 East C. L., 352; Rex v. Plant, 7 Carr. & P., 575; Hughes v. The State, 12 Ala. R., 458.

This rule was probably considered by the able and learned judge who tried this case, as altered by the provision of the Rev. Code, 572, art. 2, that "every person who shall be an accessory to any murder or other felony, before the fact, shall be deemed and considered as principal, and indicted and punished as such, and this whether the principal has been previously convicted or not." But this statute cannot be applied to this case, since the crime was committed before the statute was in force; and it is expressly provided by the Revised Code, which contained the first enactment of the provision, that no offense committed previous to the time when the acts therein contained should take

effect, and no indictment or prosecution pending at the time said acts should take effect, should be affected by the adoption of the Code, but should remain subject to the laws in force before the said Code should take effect, except that all proceedings had after the Code should take effect, should be conducted according to its provisions. Rev. Code, 44, art. 6. From this it is plain that, while the modes and forms of procedure upon indictments or prosecutions for offenses previously committed should be according to the provisions of the Code, yet the position of parties charged with such offenses, as to all substantial rights of defense, remained subject to the laws existing before the Code went into operation.

The matter here involved was a substantial right of the prisoner, and not a mere question of form of proceeding. By the law in force at the time of the commission of the alleged crime, she was not subject to conviction as an accessory before the fact upon the indictment charging her only as principal, but was entitled to be informed by the indictment what degree of guilt she was charged with, and what offense in law she was called on to answer. This was a valuable right. But to make the statute under consideration applicable to her case, would be to impair the right of defense existing by the law in force at the time the act was committed; and this, we think it clear, the legislature did not intend to do. If this view be correct, it follows that the instructions are erroneous in the particulars above stated.

But it is insisted by the attorney-general that, though this be error, yet it shall not cause a reversal, because the evidence clearly showed that the verdict was right. We do not deem it proper to express any opinion upon the sufficiency of the evidence to sustain the verdict. But it is a sufficient objection to this view, that it is a case depending on circumstantial testimony, in which it is not clearly apparent whether the jury found their verdict upon the belief that the prisoner was guilty as principal or as accessory. In order to maintain the position contended for, it would have to appear clearly from the record that the jury found or should have found their verdict upon the former view, and not upon the latter. The rule is, that where an instruction which is erroneous is given upon a material point in

the cause, a judgment rendered in accordance with it will be reversed, unless it manifestly appear, from the whole record, that no prejudice was done to the party complaining, and that the judgment was clearly correct. But, in cases depending on circumstantial evidence, which are rarely ever so presented as to be entirely clear of doubt, which, from their nature, require the greatest circumspection and caution, as well from the courts as the jury, and in which the judgment of the jury upon the facts is so conclusive of the case, it is of the highest importance that the jury be not misdirected as to rules of law; for a case of that nature will but rarely occur, where an appellate court can say that the jury were not influenced by the erroneous instruction. We cannot say so in this case, and hence cannot adopt the view presented.

In other respects, there is no error in the action of the court in giving, refusing, and modifying the instructions.

It is again assigned for error that the court overruled the prisoner's objection to the testimony of the witness La Fayette Jones, her master, in relation to her conduct and deportment towards the witness, or his wife or family, what she may have said expressing content or discontent towards him or his family, or of her situation and condition of kindness or unkindness towards himself and family, and all acts of obedience or disobedience, subordination or insubordination, in the witness' family. The answers of the witness were pertinent to these inquiries.

We think that this testimony was proper and competent, as tending to show the state of feeling of the prisoner, and as connected with the question of motive on her part to commit the act charged against her.

Another error assigned is the refusal of the court to allow the prisoner's counsel to interrogate the witness Jones, on cross-examination, to show that his slave Eliza, who was on his plantation at the time of the poisoning, had been recently before that time his cook, but was then put out into the field to work, had previously stated, shortly after Jones' marriage to his present wife, that she had poisoned his first wife, and that she would soon put her present mistress under ground; and whether the witness, on hearing these statements, had not arrested the slave

Eliza, with intent to deliver her to the officers of the law for punishment, on the charge of poisoning his first wife; and, further, whether the witness had not been, for some time prior to the poisoning in this case, in the habit of sexual intercourse with said Eliza; and also, whether, on the day of purchasing the prisoner, and on the day before the poisoning in this case, the witness had sexual intercourse with the prisoner.

As to the proposed examination with reference to the slave Eliza, it is evident that the ruling of the court was correct. No fact is shown tending to connect her with the poisoning in this case. She was working on the plantation and in the field, and was not in the kitchen or about the house; and she is not shown to have had any opportunity to commit the act. Her statements, therefore, in relation to a previous poisoning, and her intention to commit the crime again, were clearly irrelevant. So, also, was the proposed examination as to the witness' sexual intercourse with the slave Eliza.

With respect to the question as to the witness' intercourse with the prisoner, it is to be observed that the objection to it was not made by the witness, and on the ground of the nature of the question, but by the state; and the only ground upon which the state could have made it, was that it was irrelevant. It is upon that ground that it is now contended by the attorney-general that it was inadmissible. On the contrary, it is insisted, in behalf of the plaintiff in error, that the testimony sought by the question was relevant, with reference to the point of motive on her part to commit the crime, and tended to show that, if the witness was in the habit of sexual intercourse with her while she was in his family, and about the time of the poisoning, that she was not discontented with her condition, and could have had no malice to lead her to commit the crime; and that it was calculated to rebut the testimony on the part of the state, introduced for the purpose of showing her discontent with her condition, and of thereby laying the foundation for malice on her part. In this point of view, and for this purpose alone, we think that the question was competent, and should have been allowed by the court, leaving it for the jury to determine whether, if answered in the affirmative, it was a sufficient an-

swer to the imputation of malice on her part against Mrs. Jones, on account of the chastisement which she had caused to be inflicted upon her, or, perhaps, on account of the alleged sexual intercourse of her husband with the prisoner, or against Jones himself, in consequence of his having chastised her on the morning of the poisoning, and thereby changed her alleged kind feelings to those of revenge against him.

Again, it is insisted, that the court erred in overruling the prisoner's objection to that part of the testimony of the witness Jones, in which he said, that the prisoner, when examined as a witness on the trial of George for the same offense, stated that when she was coming up on the steamer Ingomar, from New Orleans, to Jones' house, after his purchase of her, she took from a girl on the boat some free papers.

We do not perceive how this testimony could have worked a prejudice to the prisoner, and therefore its admission would not alone justify a reversal of the judgment. But it was objectionable, because it was her statement, made while under examination, on oath, on the trial of George, in relation to the crime with which she was also charged; and it was, therefore, not competent evidence on her trial. 1 Archb. Cr. Prac. & Plead. (by Waterman, 6th ed., 1853), 126, 127, and cases cited in notes.

Several errors are assigned in relation to objections made in the court below, to the validity of the indictment, by motion to quash it, objection to reading it, motion in arrest of judgment, and the like.

All these objections are founded on the position, that the record does not show that the indictment was returned into court by the foreman of the grand jury, in the presence of the grand jury.

Without a particular statement of the grounds of these proceedings, we deem it sufficient to say, that the rulings of the court upon them were correct.

With reference to the assignments, because of the refusal of the court to quash the indictment on the ground of insufficiency of its averments, for misjoinder of counts, and the refusal of the court to compel the district attorney to elect upon which of the counts of the indictment he would try the prisoner, it is suffi-

cient to say, that they have already been decided to be untenable in the case of George v. The State, at the last term.

There are several assignments of error, having reference to particular circumstances which occurred on the trial and connected with it, such as objections to the *venire facias;* and to proceeding to trial, on account of the insufficient time of service of a copy of it on the prisoner; objections to the qualification of a juror; and the refusal of applications for continuance. These objections depend upon special circumstances attending the trial, and as they are of but little importance in principle, and will not be likely to arise again upon a future trial of the case, we consider it unnecessary to state our opinion in relation to them.

The last assignment of error which we will notice, is that raising an objection to the jurisdiction of the court, on the ground that the prisoner was not tried before two justices of the peace, before she was indicted in the circuit court. This objection is based on the statute, Rev. Code, 250, which provides, that for all offenses not charged to be capital, slaves and free negroes, except in particular cases, shall be tried before two justices of the peace and five slaveholders. It is manifest that this statute has no application to offenses *charged to be capital;* and the only provision in it, in reference to such cases, is that which directs that, if, upon investigation, it shall appear to the justices and slaveholders that the slave so tried by them is guilty of any crime punishable with death, by the laws of this state, the slave shall be committed for trial by the circuit court. But this clearly has reference to a case where the slave is *charged* with an *offense not capital*, and it appears, on examination by the tribunal, to be a capital case. There is, therefore, no just ground for this assignment.

With regard to the assignment presenting for review the sufficiency of the evidence to support the verdict, we deem it improper to express an opinion, because, for the errors above stated, the judgment will be reversed, and a new trial awarded; and an expression of our opinion on this point might prejudice the determination of the case upon the new trial.

Judgment reversed, and cause remanded for a new trial.

HARRELL v. STATE, 39 Miss. R., 702.

HOMICIDE.

In order to fix the guilt of a party charged as accessory after the fact, it is essential that the alleged felony should be complete. Until such felony has been consummated, any aid or assistance rendered to a party in order to enable him to escape the consequences of his crime, will not make the person affording such assistance guilty as an accessory after the fact. 1 Hale, 622; 2 Hawk., ch. 29, § 35; 4 Black. Com., 38; 3 Greenl. Ev., § 47; Rosc. Cr. Ev., 219, 220.

The crime of murder is not complete until the death occurs.

Error to Rankin circuit court. WATTS, J.

Mayers & Lowry and *W. B. Shelby*, for plaintiff in error.

The court erred in refusing defendant's instructions, and modifying them to the effect that the jury could find the defendant guilty, if he aided Richard Harrell before Telfair Harrell died, if he was "in a dying condition" when Richard left.

As William Harrell was indicted for being accessory after the fact, of the murder of Telfair Harrell, William Harrell could not be legally convicted, unless the murder was complete at the time he aided and assisted Richard in escaping.

Had the indictment charged William Harrell with having aided Richard in escaping after he had committed the felony of stabbing Telfair Harrell, with intent to kill, the conviction would have been proper. Such stabbing is felony. Rev. Code, 575, art. 18. The offense must be completed by the principal before there can be an accessory after the fact. "If one wounds another mortally, and, after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide, for till death ensues there is no felony committed." 4 Black. Com., 38; 2 Hawk., 320; 3 Greenl. Ev., 47; Chitty Cr. Law, 264; 1 Hale, 618.

T. J. Wharton, attorney general;
Cited 1 Bishop Cr. Law, 2d ed., 489.

SMITH, C. J.:

This was a conviction in the circuit court of Rankin county, under the statute defining the crime of being an accessory after

the fact, and prescribing the punishment therefor. Rev. Code, 573, § 2, art. 3.

The exceptions to the judgment are based upon errors alleged to have been committed by the court, in charging the jury.

The indictment under which the plaintiff in error was tried, alleged, first, that one Richard Harrell had (setting out the circumstances of the transaction) feloniously, wilfully and with malice aforethought, "killed and murdered" one Telfair Harrell; and, secondly, that the plaintiff in error, well knowing the said Richard Harrell "had done and committed the said felony and murder in form aforesaid," had afterwards aided and assisted said Richard, with the intention to enable him to escape and evade arrest, &c.

The evidence adduced on the trial rendered it highly probable, if not certain, that the aid and assistance which were proved to have been given by the plaintiff in error, with the intent to enable Richard Harrell to effect his escape, were, in point of fact, given after the mortal blow was dealt, but before the death of the party whose life had been assailed; but which occurred within a very short time thereafter.

Upon this state of evidence the court, at the instance of the prosecuting attorney, charged that "if the jury believed from the evidence that, after Richard Harrell had inflicted a mortal wound on Telfair Harrell, and when said Telfair Harrell was in a dying condition, the defendant aided and assisted the said Richard to escape, by furnishing him with a horse and money, and sending him away, knowing that said Richard had so wounded the said Telfair Harrell, and with a view to enable him to avoid arrest, they should find the defendant guilty.

And refused to charge, at the instance of the defendant, that if the jury believe, from the evidence, that William Harrell helped the said Richard off before the said Telfair died, they should find the defendant not guilty.

It is clear that the felony charged in the indictment to have been committed by the said Richard Harrell was the murder of Telfair Harrell, and not an assault and battery upon him, with intent to commit murder. It is, therefore, certain that until Telfair Harrell died, the felony alleged in the indictment, and in

respect to which the plaintiff in error was charged as accessory after the fact, was not consummated.

In order to fix the guilt of a party charged as accessory after the fact, it is essential that the alleged felony should be complete. Until such felony has been consummated, any aid or assistance rendered to a party, in order to enable him to escape the consequences of his crime, will not make the person affording such assistance guilty as an accessory after the fact. This is the rule recognized, without exception, by all the authorities.* 1 Hale, 622; 2 Hawkins, ch. 29, § 35; 4 Black. Com., 38; 3 Greenleaf Ev., 47; Roscoe's Crim. Ev., 219, 220.

It is clear, therefore, that the court erred in giving the instruction requested in behalf of the prosecution, and in refusing that asked for by the defense.

As we reverse for this error, we deem it unnecessary to notice another exception taken to the ruling of the court.

Judgment reversed, and cause remanded for new trial.

FRANK (A SLAVE) *v.* STATE, 39 Miss. R., 705.

BURGLARY.

The fact that another slave was being whipped in the hearing of the accused "in relation to matters connected with the offense with which the accused is charged," does not make a confession, soon afterwards made by the accused, otherwise than free and voluntary, where it does not appear that the whipping of the other slave was done for the purpose of coercing any confession or discovery from him in relation to the crime charged against the accused, and it is not shown that the whipping could have had any influence on the accused to cause him to make a confession.

Anything reasonably tending to hold out the hope or promise of reward or benefit, for confession or fear of punishment or injury for the failure to confess, is an unwarrantable inducement, which renders the confession so obtained incompetent evidence. But it is not every inducement that will render a confession inadmissible. An appeal to the character and circumstances of the party—to his responsibility to a tribunal above all earthly courts—to his situation and circumstances, might be an inducement to confess; yet such inducements would not render the confession inadmissible. Hence, an instruction which directed the jury to disregard the confession of the accused, if it were made under "any inducement whatever," is erroneous, and should not be given.

Instructions, though correct as abstract propositions of law, not applicable to the testimony, should be refused.

* 1 Chitty Cr. Law, 264; 1 Archbold Cr. Pr. & Pl., 17, note (2), by Waterman; Wharton Am. Cr. Law, 147; 1 Russell on Crimes, 87; 1 Bishop Cr. Law, 632; Wharton on Homicide, 166.

Though the finding of stolen goods in the possession of the accused, or their discovery at a place where they have been hid in consequence of information derived from him, is generally presumptive evidence of larceny only by the accused, yet if a burglary be proven to have been committed, and the accused makes a circumstantial confession of his entry of the house and taking of the goods, and then discovers the place of their concealment, in accordance with which they were found, such disclosure and finding are presumptive evidence that the accused committed the burglary.

The raising of a window-sash which was down, and which was the only obstacle to ingress through the window, and the entry of the accused through the same, is a sufficient breaking in law to constitute burglary. 13 Ired., 244; Rex v. Russell, R. & M., 377; 2 Whart. Cr. Law, 1541.

A new trial will not be granted for newly-discovered evidence when it appears from the affidavits read in support of it that the party asking the new trial must necessarily have been aware of the evidence when the trial was had.

Objections to the jury must be made before the trial of the case; it is too late to object after verdict.

Motions in arrest must be made on the ground of some defect appearing on the face of the record. Hence the fact that one of the jury was not a householder or a freeholder, or was otherwise incompetent, is no ground for a motion in arrest of judgment.

Error to Hinds circuit court. WATTS, J.

The plaintiff in error was indicted in the court below for burglary, and pleaded not guilty.

On the trial Austin Morgan, for the state, testified that in October, 1860, a day or two after his house had been entered and robbed, he found the prisoner at the calaboose in Jackson under arrest. In presence of the witness and several others, prisoner confessed that he had entered the house of the witness about one o'clock at night, and had taken therefrom a black merino coat, a shirt, and some money; that he entered the house by hoisting the sash of the window and going through it. Prisoner, in his confession, informed those present where the articles he had taken were to be found, which was in a thicket near the suburbs of Jackson, where he stated he had hid them. Witness further stated that the confession was not obtained by any inducement offered to the prisoner by him or any person in his presence; "but that they were whipping another negro in the calaboose yard for matters connected with the offense committed by prisoner." Witness proved the value of the coat to be fifteen dollars, and of the shirt seventy-five cents, and that they were found and returned to him by C. R. Dixon and A. B. Coffee. He also proved that at the time his house was entered the said black merino coat and shirt, and seven pieces of coin of the United States, of the value of twenty-five cents each,

were taken therefrom. He also stated that on the night his house was entered he retired to rest about eleven o'clock, and placed his clothing on a chair; that the window-sash was then down, and that it was the only fastening or security to prevent entrance through the window, there being no shutters and no fastening to keep the sash down. That on awakening at daylight he found the window-sash up; the said black merino coat and shirt, also his pantaloons and money, were gone; that he recovered the pantaloons, but not the money; that was afterwards refunded to him by J. M. Crafford, the owner of the prisoner. That on the outside, under the window, he found shoe-tracks. The impression of one of the shoes was very plain; the impression of the heel of the other shoe was not discovered, but the track of the shoe was all visible except the heel. The tracks appear to have been made by one shoe with a heel, and another without a heel. Witness did not measure the tracks, but afterwards, upon seeing the shoes of the prisoner in the calaboose, he saw that one of them had a heel, and one was without a heel.

Prisoner's counsel moved the court to exclude the confession of prisoner from the jury, because it did not appear to have been free and voluntary, and uninfluenced by fears of chastisement. The court overruled the motion, and prisoner excepted.

A. B. Coffee, for the state, testified that he was present when the confession referred to by witness Morgan was made; that prisoner then directed witness and others where to go to find a certain carpet-bag, and that in company with others he proceeded to the place indicated by the prisoner, and there found the carpet-bag, in which were the merino coat and the shirt claimed by witness Morgan, and which were delivered to him by witness.

The state's testimony closed here.

Defendant then introduced witness Coffee, and proposed to prove by him "that he, witness, was present at the whipping of another negro in the calaboose before the confession to witness Morgan was made, and that the whipping had relation to the charge against the prisoner, or to the crime with which he was charged." The court refused to allow this testimony to go to the jury, and the prisoner excepted.

The court instructed the jury for the state: "That the raising of a window-sash, which was the only fastening or security, and thereby entering a dwelling-house in the night-time, by a slave, some white person being in the house at the time, with intent to steal, is burglary."

The following instructions were asked by the defendant, and refused:

1. "In order to convict a defendant upon his own confession, it must be free and voluntary, and made under no inducement whatever; and if the jury believe that any inducements were held out to defendant to confess, then the law is for the defendant."

2. "That finding the articles according to the directions of the defendant is not presumptive evidence of the defendant's guilt of the crime of burglary."

3. "That any confessions made subsequently to the first, while laboring under the inducements offered in the first instance, are to be taken with caution; and if the jury believe, from the evidence, that defendant confessed subsequently while operated upon by any former inducements, then the law is for the defendant."

The jury returned a verdict of guilty. The prisoner then moved for a new trial, because—

1. "The verdict is contrary to law and evidence, there being no evidence of the breaking of the window or any other fastening."

2. "The court erred in refusing prisoner's first, second, and third charges."

3. "Surprise, in the absence of witnesses for the state, material for defendant."

4. "The court erred in granting instructions for the state."

5. "Newly-discovered testimony, viz., the testimony of A. B. Coffee, which shows that the confessions were extorted."

On the trial of this motion, the prisoner read the affidavit of A. B. Coffee, in which he stated that he was present at a confession made by defendant to C. R. Dickson, a few hours before the confession made by him to Morgan, and that "inducements and persuasions were used by said Dickson to the prisoner to

confess; and that prisoner did then and there confess to the entering of Morgan's house, and the taking therefrom the articles mentioned in the indictment;" that he never communicated these facts to the prisoner's counsel, nor to any other person he knew to be interested for the prisoner, and that he does not believe that the prisoner or his counsel were aware of these facts.

The motion was overruled.

The prisoner then made a motion in arrest of judgment, for the reason: "That Joseph Hargrove, one of the jurors who found the verdict, is neither a freeholder nor householder, but was declared to be a competent juror by the court, upon his statement under oath that he was a freeholder, the juror laboring under a mistake as to the meaning of freeholder."

On the trial of this motion, the affidavit of Hargrove was read, in which he stated that, upon his examination under oath by the court as to his competency as a juror, he answered that he was a freeholder; that his answer was made under a mistake of the meaning of the word freeholder, and that he owned no interest in land, and did not keep a house.

It was conceded to the trial of the motion that said Hargrove was examined as to his qualifications as a juror, and that he had answered that he was a freeholder or householder, and that he was not further interrogated, but was accepted by the state and prisoner as a competent juror.

The motion in arrest was overruled, and the prisoner excepted and sued out this writ of error.

J. C. Morehead, for plaintiff in error,

Cited Stringfellow v. State, 26 Miss., 157; Peter v. State, 4 S. & M., 31; Van Buren v. State, ib., 512.

T. J. Wharton, attorney general.

1. The raising of the window-sash was a sufficient breaking. 2 Wharton's Am. Cr. Law, 1543; 4 C. & P., 231; 4 Black. Com., 226.

2. The objection to the competency of the juror Hargrove came too late, after verdict. Williams v. State, 37 Miss., 409.

3. The confessions were competent. Belote v. State, 36 Miss., 96.

HANDY, J.:

The first ground of error assigned is the overruling the motion for a new trial.

Upon this several points of objection are urged to the action of the court below, which will be considered in the order in which they are presented in the argument of the counsel for the plaintiff in error.

1. It is insisted that the court below erred in overruling the prisoner's objection to the testimony of Austin Morgan, and his motion to exclude that witness' testimony.

The ground of that motion was, that the confession of the prisoner, testified to by the witness Morgan, was not freely and voluntarily made, because it appeared, from the testimony of that witness, that, at the time of the confession of the prisoner to the witness, and in the hearing of the prisoner, another negro slave was being whipped, "in relation to matters connected with the offense with which the prisoner was charged."

What was the particular cause of the whipping of the other slave, or whether it was because he was charged or suspected of a participation in the same offense charged against the prisoner, does not appear. For aught that appears, it might have been for resistance or other unlawful conduct of the slave. But it does not appear that it was done for the purpose of obtaining confessions from him, or that it was on account of the very same offense charged against the prisoner in this case. As the matter is stated in the bill of exceptions, it is impossible to infer that that whipping could, with any reasonable probability, have operated on the mind of the prisoner to cause him to make an untrue confession of his own guilt in the matter charged against him. No threat or coercion whatever was used towards him; and if the treatment of the other slave could, under any circumstances, have the effect to destroy the force of the prisoner's confession against himself, it would have to appear that the circumstances were such as to put the prisoner in such terror on his own account as plainly to destroy his free volition, and bring

his confessions under the rule of illegal coercion. No such circumstances appear here, and we think that the objection and motion were properly overruled.

The second ground of error is, the refusal of the first, second, and third instructions asked in behalf of the prisoner.

The first instruction is, in substance, that a confession, to warrant a conviction, must be free and voluntary, and made under no inducements whatever; and if any inducements were held out to the prisoner to confess, his confession will not warrant a conviction.

This is certainly much broader than the well-recognized rule upon the subject. Anything reasonably tending to hold out the hope or promise of reward or benefit for confession, or of punishment or injury for the failure to confess, is in law an unwarrantable inducement to confess, which renders the confession so obtained incompetent evidence. But there may be other "inducements" held out to a party, which are not within this rule. An appeal to the character or circumstances of a party—to his family connection and situation in life—to the claims of justice of others, whose rights or safety were involved in his declaring the truth—to his responsibility to a tribunal above all earthly courts for his falsification or suppression of the truth—these and others might very naturally be an "inducement" to a party to make a confession. Yet a confession so induced would not necessarily be incompetent; for the inducement would not be illegal. The instruction was, therefore, in its terms erroneous. But it was properly refused also for another reason. There was no evidence to show that the confession of the prisoner was induced by illegal means; and hence the instruction, if correct in its terms, would merely have stated an abstract proposition, which was irrelevant to the case as presented by the evidence.

The third error assigned is, the refusal of the second instruction, asked in behalf of the prisoner; which was, in substance, that the finding of the articles stolen, according to the directions of the prisoner in his confession, is not presumptive evidence of his guilt of the crime of burglary.

It appears by the evidence that the prisoner had confessed

circumstantially that he broke and entered the dwelling-house of the prosecutor, and took therefrom certain articles of property, and he gave directions where the articles had been placed, and that they were in a carpet-bag at that place; and upon search being immediately made, that the articles stolen were found in the carpet-bag, and at the place stated by him. It also further appears, that his manner of entering the house, as confessed by him, was corroborated by facts stated by the witness tending strongly to show that his confession, as to the mode of entering the house, was true.

The taking of the goods from the house was a part of the act of entering the house, and intimately connected with it. The confession as to the taking of the goods, and their place of deposit, was, therefore, a confession of a material part of the crime; and if the goods were found upon such, in the place and condition stated by him in his confession, this certainly tended strongly to show that the confession, both as to entering the house and taking the goods, was true. Hence, it was presumptive evidence of his guilt of both of the material acts confessed by him.

The objections to the refusal of the third instruction asked in behalf of the prisoner, are untenable, for the reasons above stated upon the first instruction.

The next error assigned is, the granting of the first instruction asked in behalf of the state, to the following effect: "That the raising of a window-sash, which was the only fastening or security to the window, and thereby entering a dwelling-house in the night-time, by a slave, some white person being in the house at the time, with intent to steal, is burglary."

The only question made on this instruction is, whether the raising of a window-sash, which was down and closed, and which was the only fastening to the window, and the entry of the party through the same into the house, is such a breaking in law as will constitute burglary. And it is well settled that it is.[1] State v. Boon, 13 Iredell, 244; Rex v. Russell, R. & M., 377; 2 Whart. Am. Crim. Law, § 1541, 5th ed.

[1] Rex v. Hall, R. & R., 355; Rex v. Haynes, ib., 450; 1 Russell on Cr., 787; Rex v. Russell, R. & M., 377; Rex v. Hall, East T., 1818; Russ. & Ry., 355; Rex v. Haines

Again, it is assigned for error that the court improperly refused the motion for a new trial, which was made on the ground of newly-discovered evidence.

This newly-discovered evidence is shown by the affidavit of the witness Coffee to be, in substance, that the prisoner had made a confession to other persons to the same effect as that made by him to the witness Morgan, whose testimony was the cause of his conviction; that the confession to Morgan was made shortly after that to the other persons; and that, in obtaining the first confession, "*inducements and persuasions* were used" by the person obtaining it, "to him to confess," &c.

This affidavit does not show what was the nature of the "inducements and persuasions" held out to the prisoner to confess; and it was therefore insufficient to show that the confession was obtained by such means as to render it incompetent evidence, as is above shown.

But the affidavit is palpably insufficient in another respect. Although it states, in terms, that the affiant did not believe that the fact of the first confession of the prisoner was known to him, or to his counsel, at the time of the trial, yet the affidavit shows that it must have been known to the prisoner; for it was his own confession. There could not, therefore, be any pretense that it was newly-discovered evidence.

The last ground of error is the overruling of the motion in the arrest of judgment. This motion was made on the ground that one of the jurors who tried the case and found the verdict was neither a freeholder nor householder, and hence that the jury was illegally constituted.

But it is settled that an objection of this sort comes too late after the verdict; and that it is not of such a nature as to vitiate the verdict. Williams v. The State, 37 Miss. R., 409. But if this were otherwise, it is clearly no ground for a motion in arrest of judgment, which must be founded on something on the face of the record.

& Harrison, East T., 1821; Russ. & Ry., 451; 2 Archbold Cr. Pr. & Pl., 330 *et seq.*, notes; 1 Hawk., c. 38, § 6; Rex v. Hymans, 7 C. & P., 441; Rex v. Hall, Russ. & Ry., 356; ib., 451; 1 Wheeler Cr. Cases, 374.

Upon consideration of the whole case, we perceive nothing to justify a reversal of the judgment, and it must be affirmed.

The counsel for the prisoner asked for a re-argument, as to so much of the opinion as decides that the objection to the juror Hardgrove came too late; and to sustain this view he cited and relied upon the following authorities: Lewis v. The State, 9 S. & M., 115; Whart. Crim. Law, 860; Dawson v. The People, 13 Wend., 351; Williams v. The State, 32 Miss. R., 389; McGuire v. The State, 37 Id., 369; Cotton v. The State, 31 Id., 504; Nelms v. The State, 13 S. & M., 500; Sam v. The State, 31 Miss. R., 480; Sellers v. The People, 3 Scam., 416; Busch v. The State, 19 Ohio R., 198; Romaine v. The State, 7 Ind. R., 67; Keener v. The State, 18 Ga. R., 216; Jeffries v. Randall, 14 Mass. R., 206; Graham & Waterman on New Trials, 19–40; but a re-argument was denied.

BEALL v. STATE, 39 Miss. R., 715.

HOMICIDE—BAIL.

Under the liberal principles of our constitution and laws, in cases of homicide, bail should be granted, even in cases where the jury might, and perhaps ought, on the same evidence, to render a verdict of guilty of murder. Moore v. State, 36 Miss. 137, cited and reaffirmed.

Error to the judgment of Hon. J. S. YERGER, Judge of the third judicial district, in refusing bail to Thomas T. Beall, the plaintiff in error.

It appears from the record that Dr. Thomas T. Beall, the plaintiff in error, was indicted both for the murder of Dr. Selser and Mr. Griffin; that he had been once tried, before suing out the writ of *habeas corpus*, on the indictment for the murder of Selser, and that the jury had been discharged on account of their being unable to agree.

It appears from the evidence that both Selser and Griffin were killed in a rencounter with Beall, on the night of the 28th of May, 1860. Dr. Pettit, who was examined on behalf of

Beall, testified that Selser and Griffin were brothers-in-law. Beall had been in the habit of visiting the house and family of Selser, in the village of Warrenton, where they both resided. The witness, some weeks previous to the killing, had of his motion told Beall that his visits to Selser's were unpleasant to the ladies there, and Beall replied that he could take a hint. On Saturday morning, the 26th of May, 1860, two days before the killing, Selser called on witness, and asked him to say to Beall "that his (Beall's) visits to his house had been frequent, and annoying to his family and visitors, and that he would have to ask him to come there no more." This message was communicated to Beall that evening, and a short time afterwards Beall called on witness, and told him that he had called on Mrs. R. (a sister of Dr. Selser, residing with him), and asked her if she had authorized the message, and that she had said that she did authorize it. In the conversation witness advised Beall "to drop it," and he seemed disposed to take his advice. On the next morning, Beall called on witness, and asked him to say to Dr. Selser "that the whole thing was so contemptible, he would take no further notice of him or his family." Witness endeavored to dissuade Beall from sending the message, but told Beall if he insisted, he, witness, would consent to carry the message. Witness and Beall then had a lengthy conversation about Dr. Selser's feelings towards Beall. Witness said to Beall that Selser's feelings were friendly towards him. Beall asked witness if Selser had authorized him to say so. Witness said he had not, but had told witness of his feelings. Beall asked witness to go to Dr. Selser and get from him an authorized statement to that effect, which witness declined to do. He then said if witness would not go he would try to get some one else, and that it might be several days before witness heard from him. Some time after this conversation Beall called on witness and authorized him to carry the following message: "That I received it with a feeling of profound contempt, and hurled it back on them just as it was sent. My dignity and self-respect as a gentleman forbid my taking any further notice of it one way or the other." Witness asked Beall whom he meant by the word "them" in the message. He said it included the ladies of the

family. Witness conveyed the message to Dr. Selser. On Monday morning witness asked Beall to write the message for his convenience; that there was something about it Dr. Selser said he did not understand, and he wanted to know who was meant by the word "them." Beall then wrote the message as follows: "Considering the terms of the message, and the circumstances under which it was sent, I received it with a feeling of profound contempt, and hurled it back on them just as it was sent. My dignity and self-respect as a gentleman forbid my taking any further notice of it one way or the other." Witness took the message as written to Dr. Selser's house. Mr. Griffin, one of the deceased, was there, and said the message could be misunderstood, and advised Dr. Selser to see Dr. Beall. Selser said he would see Beall, and ask an explanation about the meaning of the word "*them*."

In the conversation witness had with Beall on Sunday, witness said that Dr. Selser was responsible for the conduct of his sister. Beall said he did not want to hold him responsible or shoot him for what his sister had done. Witness told Beall that there was nothing insulting in the message sent by Dr. Selser, and that it was not intended to insult him, and that he ought not to be surprised at it. When Beall wrote the message, he said he did not want any difficulty with Dr. Selser, but would be prepared for one. He also asked witness how Dr. Selser received the message. Witness told him he did not know.

On Monday night, 28th of May, there was some sort of public exhibition on a "show-boat," then landed at Warrenton, and there was also what is called a "side-show," in a tent pitched on the bank of the river, near the show-boat. The moon shone, and there were also torches on the bank, which enabled parties to see what was going on. Dr. Selser, Mr. Griffin, Mr. Barnes, a brother-in-law of Dr. Selser, Mr. Bedford, and Mr. Vernon, intimate friends of Selser, were all at the show together. They all went to the show together, except Vernon, who went to accompany them, but being too late, he came on with his wife after them. All these parties were armed, except Barnes. Griffin and Selser each had bowie-knives; the others had pistols.

Barnes, Bedford and Vernon were all examined for the state, and from their evidence it appeared that the matter of the message sent by Beall to Selser had been discussed at Selser's house that morning previous to going to the show, and that Selser had determined to ask for an explanation of Beall the first time he met him. Some of these witnesses acknowledged that it was expected that Selser would meet Beall at the show, but they all denied that they were armed for the purpose of taking part in any difficulty that might ensue, or that they were present with Selser and Griffin for that purpose. They represented that Selser had determined to seek an explanation in a friendly manner, and if it was refused, and Beall attacked him, that he would then knock him down. One of these witnesses confessed that he had advised Selser to have his right hand on his weapon during the contemplated interview, and to use his left hand in case he struck Beall. All the parties, being accompanied by several ladies, went first on the boat, and soon afterwards Beall arrived. Nothing was said or done on the boat calculated to produce a rupture, but in a short time the parties left the boat. Griffin and Beall went into the side-show in the tent. The others awaited on the outside together. As soon as Beall came out of the tent Selser advanced towards him, and they approached near together about the time Beall reached the top of the levee, Selser having not quite reached the top. Selser asked Beall, in a quiet and unexcited tone of voice, what he meant by the message he had sent him. Beall said, "What message?" Selser said, "The message you sent me by ——," and at this moment Beall sprang at him, striking him in the breast. But after Selser accosted Beall, and before any blow was given, some one touched him on the arm, and he immediately changed his position so as to get on the top of the levee, on the same level with Beall; as soon as Beall came from the tent, and Selser started towards him, Barnes stated in a loud voice, "Do not let us go too close. Dr. Beall may think we intend to double-team on him, and some one may cry foul play." At the time Beall struck Selser, the latter had his hands on his hips, a position in which he usually carried them. Immediately on the striking of Selser by Beall a short struggle

ensued between them, which ended in Selser's falling down, and Beall falling upon him. Before Selser fell, and after he was struck, he said, "Beall has a knife;" and Beall replied, "Have you not one, too?" About that time Griffin stepped up, and said, "Do not interfere; let them have a fair fight." Soon after Beall and Selser fell, Griffin and one of Selser's friends took hold of Beall. As soon as Beall arose, a conflict ensued between him and Griffin. One of the witnesses heard steel clashing between them, and very shortly after, Griffin called for a pistol, stating that Beall had killed Selser, and probably himself. Vernon then attempted to shoot Beall, but was prevented by the intervening crowd. In this conflict both Selser and Griffin received mortal wounds from a dirk-knife used by Beall. Selser died immediately, and Griffin in a few hours afterwards. Griffin was wounded in two places—in the right side and one of his arms. Selser had four wounds on his body —one (mortal) just above the breast-bone on the lower part of the neck—the others were slight. Beall had a wound on his left shoulder from one to one and a half inches in width, and two or three inches deep; also a small wound on his left fore-finger, and a slight wound on the thigh. They appeared to have been made with a knife. A medical witness (Dr. Brick-well), who examined the wounds on Beall, was of the opinion that the wound on the shoulder came somewhat from above; if it had been otherwise, the wound would have inclined out-wards, as if he stood with his back to the party striking. If Griffin and Beall had been advancing from face to face, this wound could not have been inflicted, unless the party inflicting it was on the left side of Dr. Beall, and a little behind him.

The only weapons seen by any of the witnesses during the affray, was a bowie-knife in the hands of Griffin, and a pistol in the hands of Vernon, when he attempted to shoot Beall after the fight had ensued. A bowie or dirk-knife was found on the body of Selser after his death; it was in a scabbard, which was attached to the inside of his pants; no other weapon was found on his body.

At the time Selser accosted Beall, he had on a linen duster coat, which was buttoned from his chin to his knees.

A witness examined for the defense said, when he saw Selser accost Beall, he, witness, changed his position so as to get out of the range of Selser. Several witnesses were introduced for defendant who testified that Vernon had made statements, soon after the killing, contradictory to his testimony. The material points on which he was contradicted are, that he stated to three witnesses that Selser had determined to meet Beall and demand an explanation of the message, and if he failed to make a satisfactory explanation, that Selser had said that he would knock him down; to another witness he stated, that he, Vernon, had tried to persuade Selser, from the time they started, not to attack Beall, and as they went on Selser agreed not to attack Beall, but on walking further, he said he would attack Beall, but in a gentlemanly way, and if he did not give a satisfactory explanation he would knock him down. To another witness he stated, that Dr. Selser had called on him (Vernon), Griffin and Barnes, to be present when he demanded an explanation of Beall.

A witness for the defendant stated that he had gone to Bedford on the boat during the show, and asked him to prevent a difficulty between Selser and Beall, and Bedford stated he had tried, but that Selser was mad and could not be prevailed on to do it; that when he is mad he could do nothing with him.

It was proven that Selser was a stout, courageous man, about five feet eleven inches high, taller and stouter than Beall. It was also proven that the ladies who were with Selser's party at the show on the boat did not go into the tent show, but went home before the affray commenced. Beall was proven by many witnesses to be a quiet, peaceful, and well-behaved man.

The circuit judge refused bail to the prisoner, and he sued out this writ of error.

D. O. Merwin and *F. Anderson*, for plaintiff in error,

Insisted, even if the court should consider it a clear case of murder, that under the authority of Wray's case, 30 Miss. R., and Moore's case, 36 ib., there was a discretion to grant bail, and the circumstances of this case fully warranted the exercise of this discretion in behalf of the prisoner.

They also went into a critical and elaborate examination of the testimony, insisting that it did not make out a case of murder, and that the prisoner, therefore, was entitled to bail.

T. J. Wharton, attorney general.

HARRIS, J.:

The plaintiff in error prosecutes this writ of error to reverse the judgment of the circuit judge, refusing him bail on writ of habeas corpus.

The record shows that the plaintiff in error is confined in the jail of Warren county under two indictments for murder, originating out of the same transaction. The record further shows that the plaintiff in error was tried on one of said indictments in the circuit court of Warren county, before a jury, which resulted in the discharge of the jury, because they were unable to agree on a verdict.

After a careful examination of the cases presented to us in this record, we have determined that bail should have been allowed the plaintiff in error in both cases.

The grounds of our judgment we deem it proper to withhold, as the cases are to undergo examination before a court and jury, whose province it will be to determine upon the guilt or innocence of the accused.

We again repeat what was said by this court in Moore v. The State, 36 Miss. R., 142, that "we wish it understood that on applications for bail we may grant the application, even in cases where the jury might, and perhaps ought, on the same evidence, to render a verdict of guilty for murder. So much depends on the incidents of a trial by jury, the manner of the witnesses, their intelligence, their seeming bias or fairness, that cannot be brought before this court, which yet should have a material bearing on the weight of evidence, that we deem it unsafe that the opinion of the High Court in granting or refusing bail should be adopted as a criterion for the jury, by which to determine the guilt or innocence of the accused." In the case before us, we do not intend to intimate any opinion as to the guilt or innocence of the party accused.

Let the judgment be reversed, and the defendant admitted to

bail, upon his entering into recognizance before the sheriff of Warren county, Mississippi, himself in the sum of ten thousand dollars, with two good securities, jointly and severally in a like sum, in each case.

HANDY, J., dissented from so much of this opinion as reversed the judgment and admitted the plaintiff in error to bail.

CALEB (A SLAVE) v. STATE, 39 Miss. R., 721.

HOMICIDE.

Not every improper or illegal act of the officer in charge of the jury, or of the jury themselves, will constitute just cause for setting aside the verdict. It must be shown that such improper conduct of the officer or jury exposed them to the exercise of improper influences. If this is not shown the verdict will not be disturbed.

As a general rule, a witness is not permitted to express his opinion upon a particular question, whether such question arise upon a fact stated, or a combination of facts admitted or proved; yet an exception to this rule extends to persons of skill on questions of skill, science, or trade. But this exception extends only to experts, and not to persons who are not shown to be experts in whatever scientific question that may be propounded to him.

A case of circumstantial evidence reviewed, and decided insufficient.

Error to Lowndes circuit court. HAMM, J.

The plaintiff in error was indicted in the court below for the murder of William Moore. The prisoner had, on a former trial, been convicted, and a new trial had been granted by this court. On the second trial the proof was substantially as follows:

The deceased, William Moore, was overseer for one William Kidd at the time he was killed, the 25th April, 1857, and had been during all that year, and for about six weeks of the latter part of the year 1856. He resided on his employer's plantation, in Lowndes county, with the slaves, there being no white person but him on the place. The residence and negro quarters on this plantation were all in the same inclosure, and were distant from the residence and quarters of H. Vaughan about six hundred yards, and from the residence of A. Kidd about one-half mile.

There were nine negro men on the place, besides women and

children. Moore had, during his employment, occasion to correct all these except the prisoner and two others. The last time he corrected any of them was in February preceding. Moore had a large cur-dog, which was much attached to him, and constantly followed him whenever he went about the plantation. Moore slept in a house on the plantation, which was distant from the nearest negro-cabin only about ten paces, and it was so situated that he could be seen through a window, when sitting in his house, by the slaves lodging in the cabin. On Friday night, April 25, 1857, Moore ate his supper as usual, and was last seen, by several of the slaves occupying the nearest cabin, sitting down in his house smoking his pipe. On the next morning, one of the negro men, who was accustomed to make a fire in Moore's house, went in for that purpose, and discovered the door open, and the bed on which Moore slept undisturbed. Moore kept in his possession the key to the crib and mule lot, and hence it was impossible for the negroes to go to work with the mules, it being ploughing season, without the key. His absence then became immediately known to all the slaves on the place, many of whom, including the prisoner, commenced looking for tracks, to ascertain, as they said, in what direction Moore had gone. Not finding any, the prisoner went to A. Kidd, the master's son, and said to him, "That the shepherd is gone, and we are scattered." A. Kidd went over to the quarter and got the mules, and put the negroes to work in the field. Some of the neighbors were sent for to search for Moore, but the search was unsuccessful on that day. On Sunday, about thirty of the neighbors continued the search, with all the negroes about the place; and during the day the body was discovered in a wood, distant about two hundred and forty yards from the house. The body was within thirty paces of a field which intervened between the house and the wood. The wood where the body was found was not thick, the larger timber having been cut down and hauled away. The body was not on any road or path through the wood, but was near an old track which had been made by the wagons in hauling off the timber. When Moore was found, he was lying on his breast and belly, with his head in the direction of the field and house.

His arms were stretched out on the ground beyond his head, and his hands were clenched and joined together so tightly as to be separated with difficulty. The right side of his face and head were resting on his right arm. His boots were pulled off, and the leg of one of them was under his face and mouth. His right leg was extended at full length, and his left leg was drawn up and bent at the knee, and extended across the right leg. His clothes, which were the same he wore on Friday, were smooth. His pistol, which appeared to have been recently discharged, lay near enough to his right arm for him to have seized it had he been alive. A tin box of percussion caps was found under his body when he was turned over. This box had no top, but had paper or cloth over the caps to prevent them from getting lost from it. A single percussion cap was found lying on the ground near the body. There were no tracks near the body, nor was there any sign of a struggle. The deceased had in his pocket some keys and some small pieces of money. His vest and shirt were buttoned and smooth, and in the position they were worn. Upon examination, a wound was discovered under the vest and shirt, entering the body just below the breast-bone, and at the top of the pit of the stomach. This wound was one and a quarter of an inch long, and about half an inch wide. According to the testimony of some of the white witnesses, the wound was discovered as soon as the body was turned over; according to the testimony of others, it was only discoverable after removing to some extent the position of the vest and shirt. No blood whatever was discovered on his vest or clothes; but a very little blood—about two table-spoonfuls—was found on the ground under the wound, and a very little blood on the boot-leg, under his mouth. The body was in a state of putrefaction when it was discovered, and was offensive. Discolorations of the skin were found on the thighs, arms, and around the neck, which was swollen out even with the face. No *post mortem* examination was made, and no medical witness was examined to ascertain whether these discolorations were occasioned by bruises or injuries inflicted on the body during life, or whether they were occasioned by the settlement of the blood after death. All of the body was stiff except the neck. One

of the witnesses put a stick on the body near the wound, and upon pressing it, something like fat protruded from its mouth. It was stated by one of the witnesses that the wound was enlarged, and its shape altered, by pressing with this stick.

On Sunday, after the body was found, a coroner's inquest was held, and all the negroes on William Kidd's plantation were arrested, and confined, and examined separately, but no clue to the murder was discovered other than herein stated.

It was proven that the prisoner had a wife at Vaughan's, and that he had permission to visit her on the nights of Sunday, Wednesday, and Saturday; but it was shown that he frequently visited her on nights other than those permitted. It was shown by the testimony of several of the slaves on the place, that when they went to bed, about nine o'clock, prisoner was sitting in a chair asleep in the cabin nearest to Moore's house. This was not the house usually occupied by the prisoner. It was also shown by other slaves that, late in the night, prisoner came to the cabin which he usually occupied, and said he was going over to see his wife. It was proven by his wife that, after all the slaves on Vaughan's place (where she lived) had gone to bed, prisoner came to her house and woke her up, and then went to bed with her and stayed till daylight next morning. It was also proven by her that, on Wednesday, she had asked prisoner for a dollar to send to Columbus by her master on Saturday to buy a sifter and a pot, and that he promised to bring it on Friday night; and that when he got up on Saturday morning she asked him for the dollar, and he gave it to her. She stated that he left her house about daybreak; and it was proven by one or two slaves on William Kidd's place that prisoner reached home soon after light. The prisoner, upon being examined by the coroner's jury, stated that he had gone to Vaughan's on Friday night to see his wife, and carry her a dollar, according to his promise to her, to send to Columbus on Saturday by her master to buy a pot and sifter. It was also proven that Vaughan visited Columbus on Saturday. On the same examination he stated that he had not returned as early as usual on Saturday morning, because he was afraid, he having heard from the cook that a man had traveled the road

leading from Vaughan's to Kidd's quarter late Friday evening, making a *great noise.*

It was proven by Eliza, a slave (belonging to one Johnson), that she met prisoner on Sunday before Moore was killed, and asked him, "How he was getting along?" He replied, "Not at all." Witness asked what was the matter. He replied that "They had such a damned overseer." Witness asked him if the overseer had whipped him; and he said, "No; if he whipped him, he would kill him."

It was proven by Edy, a slave of W. Kidd's, and mother of Eliza, that she heard prisoner say on Friday morning (the day of the killing) that if Moore gave him the horn to blow, he would blow it at daybreak; and if he fooled with him, he would kill him. Witness said, "I hear you, Caleb; don't; if you do, I will tell master. He did not say anything. Yes, he said my evidence was nothing." Both these witnesses were contradicted on material points by other witnesses.

It was also proven that, after midnight on Friday night, precise hour not specified, some of the slaves on W. Kidd's place heard a gun fire in the direction of the place where the body was found.

It was shown that Moore was a strict disciplinarian, and usually visited the quarters on at least two nights in the week, and sometimes twice a night, to ascertain if the slaves were all at home; that he had visited the quarters for this purpose on Tuesday night. He did not visit the quarters on Friday night.

It was shown that Caleb was of good character and obedient, and had not been whipped since he was sixteen years old.

Running on one side of the field near which the body was found, was a road leading to A. Kidd's; on the opposite side was a road leading from the horse-lot on W. Kidd's place to Vaughan's; on a third side was situated the house and quarter of W. Kidd; on the fourth side was the wood in which was found the body of the deceased. The cabin in which the prisoner lived, and in which he was when he started to see his wife, was near the horse-lot, and the nearest way from that cabin to Vaughan's quarter was by the road leading from the horse-lot, as before stated. The house in which

Moore lived was about forty yards distant from this cabin, and a direct line from that house to Vaughan's would have run through this field, and within thirty yards of the place where the body was found.

The theory of the state was that Caleb did not travel the road, from fear of the "noisy man," or from fear of detection, and went across the field; and that Moore, seeing him thus going, ran around on the road leading to A. Kidd's, and intercepted prisoner in the wood, and that there a rencounter took place; and that Caleb killed Moore by either breaking his neck or suffocating; and that after life was extinct, he made the wound in the pit of the stomach to ensure death; and that Moore, in the struggle, fired his pistol at Caleb, and missed him. But it was shown, in opposition to this theory, that the road leading from the horse-lot was the one universally traveled from the quarter to Vaughan's; that there was no road or path through the field (which was then freshly plowed) or through the wood; and that Caleb was not the owner of a knife with which the wound could be inflicted; and that if Caleb wished to avoid detection in going to see his wife, the road was better, because, if he went through the field, he must necessarily go through a space in which he could be seen from the overseer's house.

The jury returned a verdict of guilty, and the prisoner then moved for a new trial, because, 1st. The verdict was contrary to the law and evidence; 2d. Because the court, in permitting witness Neillson to give his opinion as to the character of the instrument with which the wound was inflicted, erred; 3d. Because the jury were exposed to improper influences.

The testimony offered in support of the third ground for a new trial was the testimony of the two bailiffs in charge of the jury; and from their testimony it appeared that the case was finally submitted to the jury to consider of their verdict about ten o'clock at night; that there were two sworn bailiffs, and that they immediately took the jury to a room in a hotel about three hundred yards distant from the court-house, to consider of their verdict; that in going to the hotel, the jury were all kept together, one of the bailiffs preceding the jury

and one following them; that no person had any communication with them during the time they were considering of their verdict; that they were locked up in a room at the hotel, and the bailiff had the key to the door; that while they were considering of their verdict, the bailiffs occupied the adjoining room, and that the door between the two rooms was slightly ajar, so that the bailiffs could see into the room where the jury were; one of the bailiffs was all the time present in this adjoining room; and that neither of the bailiffs knew what the verdict was until it was read in open court.

It did not appear how long the jury were considering of their verdict. It appeared that, during the trial, the state and prisoner had consented that the jury, under the charge of the bailiffs, should take their meals at the hotels, and the bailiffs assigned this consent as a reason why they permitted the jury to go there to consider of their verdict, instead of to a jury-room in the court-house.

The facts in relation to the exception taken to the testimony of witness Neillson are fully set out in the opinion of the court. The court overruled the motion for a new trial, and the prisoner excepted, and sued out this writ of error.

G. R. Clayton and *B. Matthews*, for plaintiff in error.

1. On the point of the testimony of experts, cited, 1 Greenl. Ev., 440; Stark. Ev., 154; Phill. & Am. Ev., 809; Tait, 433; Hawthorn v. King, 8 Mass., 371; Hodge v. Fisher, 1 Peters' C. C. R., 163; Folkes v. Chaddell, 3 Doug., 157; NcNally Ev., 329–335; Mendum v. Commonwealth, 6 Rand., 704; Tullis v. Kidd, 2 Ala., 648; 1 Bouv. Law Dict., 545.

2. On the point that the conduct of the jury vitiated the verdict, Hare's case, 4 How., 187; Bole's case, 13 S. & M., 398; McQuillen's case, 8 ib., 596; Organ's case, 26 Miss., 83; Pope & Jacobs v. State, 36 ib., 121; Ned and Taylor v. State, 33 ib., 372.

3. That the evidence did not sustain the verdict, Algheri's case, 25 Miss., 589; U. S. v. Jones, 1 Wash. C. C. R., 372; 3 Phill. Ev. (Cow. & Hill's Notes), 451, notes 283–285, 288; Hart v. Newland, 3 Hawks, 122; Atwood's case, 4 City Hall Re-

corder, 91; Plunket's case, 3 ib., 137; 3 Stark., 497; 2 Phill. Ev., 386; 3 Greenl. Ev. (3d ed.), 137; Hodges' case, 2 Lewin C. C. R., 227, and note; McCann v. State, 13 S. & M., 497.

4. In relation to the changes in body, and wound after death, Wharton & Stille Med. Jurisprudence, 546, § 806.

C. R. Crusoe, for the state,

Filed an elaborate written argument, insisting that the verdict could not be set aside; that it was not clearly against the evidence, or without evidence, and that only in such cases would this court set aside a verdict in a criminal case, especially where there were two concurring verdicts of guilty. On this point he cited and relied on the following authorities: Cicely's case, 13 S. & M., 213; McCann's case, ib., 497; 1 Stark. Ev., 577, 502, 497.

On the testimony of experts, see 1 Greenl. Ev., 440, and cases cited.

SMITH, C. J.:

This was an indictment for murder, tried in the circuit court of Lowndes county, upon which the plaintiff in error, a slave, was convicted. A motion was made for a new trial upon the following grounds, to wit: 1. Because the verdict of the jury was contrary to law and the evidence; 2. Because the court erred in permitting a certain witness to give his opinion as to the instrument with which the wound upon the body of the deceased was inflicted; and 3. Because the jury were exposed to improper influences by the misconduct of the officers placed in charge of them. Which motion being overruled, the prisoner excepted, and prosecutes this writ of error.

The exceptions to the judgment are based upon the same grounds relied on in support of the motion for a new trial. We shall reverse the order pursued by counsel in assigning the causes for a new trial.

1. It is insisted that the judgment should be reversed, and a new trial granted, because the jury retired from the court-room to a room at a public hotel in the town of Columbus, through

the public streets, at night, to consider of their verdict, without the consent of the court or the counsel for the defendant.

Affidavits were read in support of the motion. From the evidence thus furnished, it is clear that the conduct of the bailiffs in charge of the jury was unauthorized and illegal, and should have been severely reprehended by the presiding judge. But it is settled that it is not every improper or illegal act of the officer in charge of the jury, or of the jury themselves, which will constitute just cause for setting aside the verdict. 36 Miss. R., 136.

The question here to be considered is not whether the bailiffs in charge of the jury, in conducting the jury through the streets of the town to a room at the hotel, were guilty simply of a violation of duty, but whether, by such improper conduct on their part, the jury were exposed to influences which might have affected the purity of their verdict. If they were so exposed, according to the long and well-settled doctrines of this court, unless it were also affirmatively shown that such influences failed of effect, their verdict would be suspected, and should therefore be set aside. Here, without noticing the evidence in detail, it is only necessary to say, that it appears with sufficient certainty that the jury were not subjected to improper influences, or placed by the conduct of the officers in such a situation as it was at all probable that such influences could be brought to bear upon them.

This exception is, therefore, unsupported and untenable.

2. It is next contended that the court erred in permitting Charles Neilson, a witness examined on behalf of the prosecution, to state his opinion to the jury as to the particular instrument with which the wound found in the breast of the deceased was inflicted.

This witness, in his examination before the jury, having described the locality where the deceased's body was found, its position upon the ground, the condition of the clothes, and other connected circumstances, stated that he was well acquainted with the difference in appearance between gunshot wounds and wounds made with a knife or sharp instrument; that his knowledge was derived from experience and observation; that he had

frequently seen gunshot wounds and wounds made with a knife, on the body of men; that in gunshot wounds the edges were depressed; in wounds made with a knife the edges were usually smooth, and the lips of the wound protruded; that he examined the wound on the body of the deceased. He saw but one wound on the body of the deceased. That was just below the breast-bone, in the pit of the stomach, directly in front; the wound appeared to be about one and a quarter inches long, and about three-quarters of an inch wide; that he had seen as much as a dozen gunshot wounds, and about the same number of cuts with a sharp instrument, on the human body; had seen the wounds on two persons in Mexico, who were said to have been shot in five or six places, and had seen the wounds on another person who was said to have been cut with a knife in five or six places, and had seen cuts made by medical men in lancing swellings on the human body; that all the knowledge he had in relation to the character of wounds is derived from having seen these persons, and from experience and observation; that gunshot wounds are rough, and cuts smooth; the body of deceased was in a state of putrefaction, and he had never seen a wound when the body was in a state of putrefaction before.

Having testified as to these facts, the witness was asked by counsel for the prosecution to state to the jury whether the wound he had described, on the body of the deceased, had the appearance of a gun-shot or pistol-shot wound, or of having been made with a knife or sharp instrument; which question was objected to, but the objection was overruled, and the witness permitted to answer. The witness stated in reply to said question, "That the wound below the breast-bone of the deceased (the wound he had described) was made with a knife."

As a witness is called for the purpose of deposing as to facts only, as a general rule he is not permitted to express his opinion upon a particular question, whether such question arise upon a fact stated, or a combination of facts, admitted or proved. Notwithstanding this is the general rule, there are some classes of witnesses who may deliver their opinions. For example, "On questions of science, skill, or trade, or others of the like kind, persons of skill, sometimes called experts, may not only testify

to facts, but are permitted to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted as to the cause of disease or death, or the consequences of wounds, &c., and also as to other subjects of professional skill." Roscoe's Cr. Ev., 166, 167; 1 Greenleaf's Ev., § 440; Jones v. Finch, 37 Miss. R. 461.

There was not a particle of evidence before the court, except the statements of the witness himself, which tended to prove that he possessed the knowledge or skill requisite to enable any one to form an intelligent opinion on the subject about which he deposed. The witness was not offered as a person skilled in the science of medicine or surgery; and he did not himself pretend to any knowledge in either of those branches of science. He states his entire knowledge and experience in regard to wounds made upon the human body by gun-shot and by sharp-edged instruments. From his own statements, it is most manifest that he was not embraced in any class of witnesses, made exceptions to the general rule above laid down.

The court therefore erred in permitting the question to be propounded to this witness, and his answer to go to the jury as evidence. And the error here committed may have had an important effect upon the verdict; for without proof that the mortal wound was inflicted by means of a knife or some sharp-edged weapon, as no knife or sharp-edged weapon was found near the corpse of the deceased, the jury may have doubted, under all the circumstances proved, whether the deceased fell by his own hand or that of an assassin. For this error the judgment must be reversed.

3. The last exception which we shall notice, points to the error alleged to have been committed by the court in overruling the motion for a new trial. The ground assumed, and which was mainly relied on for a reversal of the judgment, is, that the verdict was not warranted by the evidence in the case.

When this cause was before us on a former occasion, the only question presented by the record was the same question which we are now considering. We were then well satisfied

that the evidence did not justify the verdict, and, consequently, remanded the cause for a new trial. The evidence contained in the record before us does not present the case in a materially altered aspect; and after a careful and patient examination of the facts, and the law applicable to them, we have arrived at the same conclusion. As we reverse and remand the cause, and as there will, probably, be another trial, without proposing to go into a detailed examination and minute comparison of the testimony of the numerous witnesses, we deem it proper to submit some general observations upon the prominent features of a transaction which, after searching and repeated examination, remains shrouded in impenetrable mystery.

It appears that William Moore, the subject of the alleged homicide, lived on the plantation of William Kidd, in the county of Lowndes, in the capacity of an overseer. He had no family, and was the only white person who resided on the plantation, and the sole occupant of a house in close proximity to to the quarter. There were nine negro men under his charge, as overseer, one of which was the accused, a slave of excellent character, and foreman on the plantation. He was constantly followed by a fierce dog, much attached to his master. On Friday, the 23d of April, 1857, Moore was seen by a witness sitting in his house after supper. On the following morning, when a servant went to make a fire in Moore's house, the door was open, Moore was absent; his bed appeared not to have been occupied the preceding night; everything was in place, and nothing indicated that the room had been the scene of violence and murder. Having in his possession the keys of the corn-crib and mule-lot, his absence was known by the negroes at daylight, at least very early in the morning; and as he did not return, information of his absence was conveyed to the neighbors, who commenced a diligent search for him, which was continued until the afternoon of the 27th, when his dead body was found at a distance of two hundred and fifty or three hundred yards from his house, in a wood beyond a field which lay in front of the house.

When the body was discovered, it was lying on the stomach and breast; the face rested on one arm, and both arms were

extended and the hands clasped. The boots were off; one was under the face, and the other a few feet distant. An empty pistol of small calibre was found lying near the body, which appeared to have been recently discharged. No knife or other sharp-edged weapon was found. The clothes were smooth and unrumpled. Upon turning the body over, a wound was discovered in the stomach just below the breast-bone. According to some of the witnesses, the vest and shirt were buttoned so that the wound could not be perceived until they were opened; but according to others, the bosom was open, so that the wound was seen as soon as the body was turned over. Very little blood had escaped from the wound. A small quantity of blood, just under the wound, as the body lay on the ground, was discovered, and the clothes were neither cut nor stained with blood. The body was much swollen and very offensive. The wound, when first observed, was about one and a half or two inches in length, and three-quarters of an inch wide. The lips of the wound were smooth, and not depressed, but protruded. No *post mortem* examination was made to ascertain the kind of weapon with which the wound was inflicted. This was the only wound upon the body of the deceased. There were, however, marks and discolorations of the skin on different parts of the body, which might have been the effects of violence; but as decomposition had commenced, it is more probable that they resulted from a different cause.

These facts, distinctly proved, appear to be conclusive against the assumption that the deceased fell by his own hand. And as it is in the highest degree improbable, upon the supposition that the shirt and vest were open at the moment when he received the fatal wound, so that both vest and shirt escaped injury, that after having slain his victim, the assassin should have taken off the boots, buttoned the shirt and vest, and turned the corpse upon its face, and as there was neither rent nor cut in the shirt or vest, it is impossible that the deceased's clothes were on, with the shirt and vest buttoned up, when the wound was inflicted, whether by a knife or pistol; and moreover, as it is equally improbable, if not absolutely impossible, upon the supposition that the wound described by the wit-

nesses was the cause of the death, and that it was inflicted where the body was found, that there should not have been a greater effusion of blood, and that the clothes found upon the deceased, particularly the shirt and vest, should have been unstained by a single drop, the supposition that the actual scene of the murder was the place where the dead body was found must be utterly rejected.

Discarding, then, as well the hypothesis of suicide as the supposition that the homicide was committed where the body was discovered, the question, "Where was the actual scene of this mysterious tragedy?" naturally presents itself.

It is manifest that the evidence furnishes no clew to guide us to any satisfactory conclusion.

For, first, if it be assumed that the deed was not perpetrated at the place where the body was found, but the body was conveyed there afterwards, the conclusion is inevitable, that more than one person was concerned in the murder. And assuming this to be the fact, as it was proved, that the deceased was in his house after night on Friday, the 23d, and there was no evidence that he afterwards left the plantation, the inference would be natural and reasonable, that some point adjacent to the deceased's house or the negro quarter was the actual scene of the homicide. But many circumstances, clearly proved, render this supposition highly improbable. Nevertheless, if it be assumed that the deceased met his death at or near his house, or anywhere else on the plantation, it is certain that the proofs were insufficient to create even a probability of the guilt of the accused.

And, secondly, as there was no direct evidence that the deceased left his house and went away from the plantation on the night of the 23d, the facts in conflict with the supposition that he was killed on the plantation are the only circumstances which can authorize the belief that the deceased met his death at some place in the neighborhood. But if it were assumed, as proved, that the deceased did, in fact, leave home on that night, that he met his fate somewhere else, and that after the murder was consummated, the body was conveyed to the place where it was found on the 25th, it is manifest that independent facts, not proved, must be assumed, or inferences from assumed facts must

be resorted to, in order to connect the accused with the alleged offense. For example, it must be assumed, that while absent from the plantation the deceased and the accused did encounter each other on that night; or it must be inferred from some assumed fact, or inferred from the inferences drawn from the facts proved, that such encounter did take place, and, therefore, that the accused had an opportunity to commit the alleged offense. It was in proof, that the accused left home on that night to visit his wife at Vaughan's, and let it be admitted, that on his way there he was intercepted by the deceased, and that a conflict ensued, it is nevertheless highly improbable, if not impossible, that in such rencounter the latter was slain. The very small effusion of blood which occurred, the fact that there was neither rent nor cut in the shirt or vest, which covered the wound, and the fact that no part of the deceased's clothing was blood-stained, seem to be conclusive against the supposition not only that the homicide was committed where the body lay, but especially, that the mortal wound was inflicted by the use of any species of firearms, or with a sharp-edged weapon.

Then, discarding each of these suppositions, and they are the only ones entitled to consideration, we are left to vague conjecture as to the actual scene of the murder.

In respect to the more material inquiry, "Who was or were the guilty agent or agents in this transaction?" the evidence is not much more satisfactory. And after a careful examination of the facts proved on the trial, tending to establish the guilt of the accused, and giving to each of them separately, and to all of them combined, their due legal weight, while in view of two concurring verdicts, declaring the guilt of the accused, we are not prepared to say that there are not strong grounds for suspicion, we are well satisfied that the proofs were insufficient to authorize a conviction.

Judgment reversed. new trial awarded, and cause remanded for a new trial.

HOGSETT v. STATE, 40 Miss. R., 522.

LARCENY.

The admission of improper testimony, when no objection is made to it at the time, is no ground of error.

An instruction that assumes that statements made by an accused are a confession of his guilt is erroneous. It is for the jury to determine, upon consideration of his whole statements, whether or not they show guilt, and that is a matter entirely for their determination.

An instruction which assumes the grade and weight of a supposed confession is erroneous. It is the duty of the court to admit the evidence, and to tell the jury that it is competent evidence to be considered by them; and this is the whole extent of the power of the court over the matter.

To constitute larceny, it is not necessary that the accused should have actually laid his hands on the article stolen; it is sufficient if he, with an intent to commit larceny, is near by, aiding and abetting other parties.

Error to Rankin circuit court. WATTS, J.

The opinion of the court contains a sufficient statement of the facts of the case.

A. R. Johnston, for plaintiff in error.

The court erred in permitting witness Hudnall to testify as to the statement of Lemly to witness that the wagon used for hauling the cotton alleged to be stolen was his, and that accused was the driver hired by him. Lemly being a competent witness, evidence of his statement was clearly open to all the objections to hearsay.

In the first charge for the state, the court erred in assuming that plaintiff in error had *confessed* his guilt. There is no confession given in evidence, as his mere *statement* constantly asserted his innocence. The court instructed the jury that they might, without adverse evidence, reject any part they chose of his statement.

In the second charge for the state, the court instructed the jury in effect that, though the accused might have been present innocently, believing the purpose lawful and honest, yet the mere fact of his being present, aiding in removing the cotton, was conclusive of his guilt. This was calculated to mislead the jury, and doubtless did so, and was error.

Besides the erroneous instructions, the verdict was contrary to the law and the evidence, and the new trial should have been

granted. The only evidence of the guilt of the accused is his own statement, and the identification of the wagon used in carrying away the cotton. The latter was proved by hearsay testimony. The statement of the accused, as a whole, denies his guilt, and explains suspicious circumstances, and throughout proclaims his innocence. It is a mere exculpatory statement, and not a confession, as the court erroneously charged the jury. Hence the legal principle, that portions of a "confession" favorable to accused may be rejected, does not apply. The statement was not sufficient of itself to warrant conviction. Besides, the evidence of a fellow-freedman, and of Mr. Hogsett, his former master, showed that previously he had a good character for honesty. The latter states that accused had charge formerly of the depot business of the Southern Railroad, and always proved to be faithful and honorable. I am aware that when there is direct proof of guilt, proof of former good character is inadmissible. But where the proof is not clear, and circumstantial proof alone is on, such proof is admissible. 2 Stark. Ev., 303; 1 Phill. Ev., 468 (ed. 1849); 3 Phill. Ev., 623, note 318.

His guilt being at least doubtful, his good character, as proven, ought to have secured a verdict of not guilty.

Cooper and *Smith*, on same side.

The only evidence to support the indictment was the fact that accused was driver of the wagon used in stealing the cotton. In this, as in cases of suspicion or presumption arising from a recent possession of stolen property, if the accused can give a reasonable account of such possession, he cannot be convicted. In this case the accused did give a reasonable account, which was not controverted by other proof. His statement is not a *confession*, but a mere explanation, and furnishes such an account as ought to acquit him, in the absence of proof of its falsity.

Independent of the erroneous charges, there was not proof sufficient to warrant a conviction. Surely there was not enough to prove guilt beyond a *reasonable doubt*. Algheri v. State, 25 Miss., 589. The instructions of the court are in conflict with

the ruling of the high court in the cases of Brown v. State, 32 Miss., 433, and Wesley v. State, 37 Miss., 329.

The first charge assumes a *confession* by the accused, and its confirmation by circumstances, rendering it the *highest evidence* of his guilt, whereas every word that he utters is in *positive denial* of guilt.

The second charge assumes that he was *aiding* and *abetting*. The proof is that he was there not by his own consent, and did not aid or assist.

C. E. Hooker, attorney general.

The admissions of accused, made to Holland and Jayne, coupled with his flight when pursued with the other thieves, conclusively establishes his guilt. Accused cannot shelter himself under the plea that he acted as agent for another. Kliffield v. State, 4 How., 307. "A verdict founded on circumstantial evidence will always be permitted to stand, unless it is opposed to a decided preponderance of evidence, or is based on no evidence whatever." Browning v. State.

A correct verdict will not be set aside for erroneous instructions, when, if correctly given, they could not have changed the result. So, in a case brought up on a refusal to grant a new trial, when the verdict is according to the law and the evidence. Hill v. Calvin, 4 How., 231; Baynton v. Finnal, 4 S. & M., 193. There is no special bill of exceptions to the instructions other than that to the overruling of the motion for a new trial. This court has decided that they will not notice objections to instructions, unless they are embodied in a bill of exceptions. In the case of Hayne v. State, 3 Ga., 400, the court say: "Conceding that defendant's instruction, which was refused, was correct, and should have been given, the verdict ought not to be set aside, as it was manifestly correct on the evidence.

The confession of the accused, corroborated by circumstances calculated to convince the jury of its truthfulness, constitutes the highest character of evidence. 2 Russ. Cr., 824, notes *a*, *b*. The instruction of the court below is entirely different from that in Brown v. State, on that state which existed in Stringfellow's case, on which the decision in Brown's case is based.

HANDY, J.:

The plaintiff in error was indicted and convicted in the circuit court of Rankin county, for the larceny of two bales of cotton.

The evidence on which the conviction was founded is in substance as follows: Joseph Hudnall testified that, about 11 or 12 o'clock at night, he was informed there was a noise at the gin-house on his father's plantation, and he supposed some one was stealing cotton; that he made haste and proceeded to the gin-house, and pursued a wagon and overtook it about half a mile from the gin-house, and it contained two bales of cotton, which he identified as his father's. On his overtaking the wagon, the persons who were with it fled, and he saw no person. On the next day he went to Brandon to find the owner of the wagon, but could not; and on the following day, accompanied by Col. Jayne, he went to Jackson, taking the wagon with them, and they drove up before S. Lemly's door, and Mr. Lemly acknowledged that the wagon was his, and that the accused was hired by him as his driver to do hauling, and that he paid him by the month or week. The accused was then present, and stated that, as a wagoner, he had been hired to go to Rankin county, and haul some cotton to Jackson; that the man who hired him had paid him $15, and promised to pay him $10 more when the hauling was completed; that he started with his wagon, and after proceeding about five or six miles in the direction of Brandon, as directed, the white man who had hired him met him, and told him that he could not get the cotton he originally intended him to haul, and that the accused would have to go to Brandon and haul other cotton; that the accused, with another negro, came on to Brandon, where they stayed until late at night, and with the white man, and two other negroes, who got on the wagon, proceeded to Mr. Hudnall's gin-house; but just before they reached there, the wagon made a considerable noise, and the white man cursed the accused, and told him not to make so much noise; that the accused then suspected for the first time that the object of the white man was to steal, and he told the white man he had better drive the wagon himself, and that accused gave up the driving to him; that the accused

was mad, and did not help to load the wagon, but was near by; that he did not know the white man's name, but had often seen him in Jackson, and knew his face. Witness Hudnall stated that the cotton was taken from his father's gin-house in Rankin county, and was worth $200 per bale.

Jayne corroborated the statements of Lemly and the accused, as detailed by Hudnall, and this was all the evidence for the state.

Two witnesses for the accused testified that they had known him for many years, and that he had always sustained a good character for honesty. And here the evidence for the defense was closed.

The first error assigned is, that the declarations of Lemly, as stated by the witness Hudnall, were improperly allowed to go to the jury.

This evidence went to the jury without objection on the part of the accused, and therefore its admission cannot be assigned for error; but besides this, it was immaterial, since the substance of it was admitted in the statements made by the accused; and having been made in his presence, and not denied, it must be taken as adopted by him.

The second error assigned is, that the court granted the first instruction asked by the state, which is in these words:

"That the confession of the accused of his guilt, when confirmed by circumstances, becomes the highest evidence of his guilt; and the jury have the right to receive a portion of the confession, and reject other portions, if the attending circumstances, in their opinion, warrant such rejection."

This instruction is objectionable in two respects: 1st. It assumes that the statements made by the accused were a confession of his guilt. It went to the jury as the opinion of the court, that the statements had that effect in law. This was error. It was for the jury to determine, upon consideration of his whole statements, whether or not they showed guilt, and that was a matter entirely for their determination. He was entitled to the benefit of all he said at the time, if anything tending to his exculpation, and that was to be considered by the jury in connection with such facts stated by him as tended

to inculpate him; and from the whole the jury should have been left free to determine whether it showed his guilt or not. 2d. It instructs the jury as to the grade and weight of the assumed confession. This was erroneous. It was the duty of the court to admit the evidence, and to tell the jury that it was competent testimony to be considered by them; and that was the extent of the power of the court over the matter. All the rest was the province of the jury. It was for them to graduate its character and to determine its effect; and it having been pronounced competent to be considered by them in making up their verdict, it rested with the jury alone to give such weight to it as, under all the circumstances, they might consider it entitled to. Neither the weight nor the character of the evidence was within the province of the court, as a matter of law to be declared by the court, but in both respects it was a matter to be fixed by the jury. The court declares the law, and the jury responds to the facts. The powers of each are well defined, and cannot be too carefully observed; and an encroachment of either upon the province of the other cannot fail to produce confusion. A practice leading to such a result cannot be too firmly discountenanced.

The instruction comes fully within the rule in Brown v. State, 32 Miss., 433. It is insisted, in behalf of the state, that the clause in the instruction as to *confirmation by circumstances*, takes it out of the principles recognized in that case. But we do not think so. If there were independent circumstances in this case, tending to corroborate the statements of the accused, and to show his guilt, such circumstances were proper to be considered by the jury, who, it must be presumed, would give them their due weight as matters of fact. But there was nothing in that state of facts calling upon the court to declare as matter of law, that such evidence was of the highest grade to establish guilt.

The third assignment of error is, that the second instruction given for the state is erroneous. It is, "that though the prisoner may not have laid his hands upon the cotton, yet if he was near by, aiding and abetting the parties, he is deemed a participant, and that is a sufficient taking."

This is undoubtedly correct as an abstract proposition, and we think it was proper in reference to the evidence in this case. It submitted the question of the presence of the accused with a criminal intent to the determination of the jury, and we think the evidence was such as properly to present that question for their consideration. Taken in connection with the sixth instruction given for the accused, the rule of law on the whole question was properly stated to the jury.

The fourth and fifth assignments refer to the sufficiency of the evidence to sustain the verdict, and as that question will be properly presented to the jury upon the new trial, it is not proper that we should now express any opinion upon the subject.

The judgment is reversed, the verdict set aside, and the case remanded for a new trial.

HARLAN *v.* STATE, 41 Miss. R., 566.

LARCENY.

After the act of secession of 1861, the state of Mississippi was a government "*de facto et de jure*;" its constitution and laws remained the same, except so far as altered by its own acts; rights of property are to be governed, contracts to be construed, and crimes to be tried and punished by the same laws that existed before the date of the act of secession, or that have been enacted since. Green v. Sizer, 40 Miss., 530; Hill v. Boylan, ib., 618.

The laws of the state of Mississippi, as they stood at the date of the ordinance of secession, continued in force afterwards, precisely as before, unaffected by that ordinance, or by the war, by the deposition of the state magistrates in May, 1865, or by their restoration in the fall of that year. Offenses against the criminal laws, committed during the war, or during the occupation of the state by the armed forces of the United States, are indictable and punishable now, as if these events had never occurred.

The jurisdiction over crimes, conferred by law upon the county courts, is not an exclusive jurisdiction, but concurrent with that of the circuit courts.

Error to Noxubee circuit court. FOOTE, J.

Jarnagin & Rives, for plaintiff in error.

C. E. Hooker, attorney general.

ELLETT, J.:

An indictment was found on the fourth day of December, 1865, in the circuit court of Noxubee county, against the plain-

to inculpate him; and from the whole the jury should have been left free to determine whether it showed his guilt or not. 2d. It instructs the jury as to the grade and weight of the assumed confession. This was erroneous. It was the duty of the court to admit the evidence, and to tell the jury that it was competent testimony to be considered by them; and that was the extent of the power of the court over the matter. All the rest was the province of the jury. It was for them to graduate its character and to determine its effect; and it having been pronounced competent to be considered by them in making up their verdict, it rested with the jury alone to give such weight to it as, under all the circumstances, they might consider it entitled to. Neither the weight nor the character of the evidence was within the province of the court, as a matter of law to be declared by the court, but in both respects it was a matter to be fixed by the jury. The court declares the law, and the jury responds to the facts. The powers of each are well defined, and cannot be too carefully observed; and an encroachment of either upon the province of the other cannot fail to produce confusion. A practice leading to such a result cannot be too firmly discountenanced.

The instruction comes fully within the rule in Brown v. State, 32 Miss., 433. It is insisted, in behalf of the state, that the clause in the instruction as to *confirmation by circumstances*, takes it out of the principles recognized in that case. But we do not think so. If there were independent circumstances in this case, tending to corroborate the statements of the accused, and to show his guilt, such circumstances were proper to be considered by the jury, who, it must be presumed, would give them their due weight as matters of fact. But there was nothing in that state of facts calling upon the court to declare as matter of law, that such evidence was of the highest grade to establish guilt.

The third assignment of error is, that the second instruction given for the state is erroneous. It is, "that though the prisoner may not have laid his hands upon the cotton, yet if he was near by, aiding and abetting the parties, he is deemed a participant, and that is a sufficient taking."

This is undoubtedly correct as an abstract proposition, and we think it was proper in reference to the evidence in this case. It submitted the question of the presence of the accused with a criminal intent to the determination of the jury, and we think the evidence was such as properly to present that question for their consideration. Taken in connection with the sixth instruction given for the accused, the rule of law on the whole question was properly stated to the jury.

The fourth and fifth assignments refer to the sufficiency of the evidence to sustain the verdict, and as that question will be properly presented to the jury upon the new trial, it is not proper that we should now express any opinion upon the subject.

The judgment is reversed, the verdict set aside, and the case remanded for a new trial.

HARLAN v. STATE, 41 Miss. R., 566.

LARCENY.

After the act of secession of 1861, the state of Mississippi was a government "*de facto et de jure*;" its constitution and laws remained the same, except so far as altered by its own acts; rights of property are to be governed, contracts to be construed, and crimes to be tried and punished by the same laws that existed before the date of the act of secession, or that have been enacted since. Green v. Sizer, 40 Miss., 530; Hill v. Boylan, ib., 618.

The laws of the state of Mississippi, as they stood at the date of the ordinance of secession, continued in force afterwards, precisely as before, unaffected by that ordinance, or by the war, by the deposition of the state magistrates in May, 1865, or by their restoration in the fall of that year. Offenses against the criminal laws, committed during the war, or during the occupation of the state by the armed forces of the United States, are indictable and punishable now, as if these events had never occurred.

The jurisdiction over crimes, conferred by law upon the county courts, is not an exclusive jurisdiction, but concurrent with that of the circuit courts.

Error to Noxubee circuit court. FOOTE, J.

Jarnagin & Rives, for plaintiff in error.

C. E. Hooker, attorney general.

ELLETT, J.:

An indictment was found on the fourth day of December, 1865, in the circuit court of Noxubee county, against the plain-

against the criminal laws, committed during the war, or during the occupation of the state by the army of the United States, are now liable to indictment and punishment, as if these events had never occurred. The laws themselves were not suspended during the administration of General Canby and Provisional Governor Sharkey, but only their administration was temporarily obstructed. Such a suspension of the active powers of government cannot be held to grant an unlimited license for the commission of crime, but, on the restoration of the proper functionaries, offenders may be held to their due accountability.

The indictment in this case was found on the 4th of December, 1865. Larceny, under the value of $25, was, by the Revised Code, a felony (page 604, article 191). By act of Nov. 24, 1865, p. 75, § 20, larceny, to a value not exceeding $100, is made a misdemeanor; and, by the third section of the same act, it is made a misdemeanor; and, by the third section of the same act, it is made cognizable by the county courts. This act went in force from its passage. These provisions took effect upon this offense, though it was committed before their adoption. The question then arises, whether the jurisdiction over crimes conferred by law upon the county court is an exclusive jurisdiction, or only concurrent with the circuit court. If exclusive, then the indictment in this case was void. Upon a careful consideration of the statute, we are satisfied that, although the county court is invested with "full and complete jurisdiction" over the cases enumerated, yet it was not intended that its criminal jurisdiction should exclude that of the circuit court over the same offenses. The circuit court already possessed the jurisdiction; and the fact that the same jurisdiction has been since bestowed upon another tribunal will not have the effect to deprive the circuit court of its jurisdiction, without some negative words indicating plainly such an intention. The jurisdiction is therefore concurrent.

The judgment of the court below will therefore be affirmed.

BOWLER v. STATE, 41 Miss. R., 570.

FALSE PRETENSE.

In all indictments for felony, it is necessary to charge that the offense was committed "feloniously."

The Rev. Code, 630, art. 357, which provides, "that offenses at common law indictable and punishable by statute, may be indicted, and described or charged according to the common law or statute; and on conviction shall be punished as prescribed by statute," &c., does not apply where the grade of the felony—where the grade of the common law offense—has been increased by statute from a misdemeanor to a felony, the misdemeanor being merged in the felony.

Under an indictment for obtaining money under false pretenses, the pretense must be fully proven by the state.

When the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is to be taken as true, unless disproved by that party. 35 Miss., 910.

That which amounts to mere possibility only, or to conjecture or supposition, is not what is meant by reasonable doubt. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the evidence before them. 13 S. & M., 210.

To sustain an indictment for obtaining money under false pretenses, it must be shown not only that the pretences were false, but also that they were made with the design of obtaining money, and that the money was paid in consequence of the false pretenses.

Error to Lowndes circuit court. FOOTE, J.

Pleasant Bowler was indicted at the February term of the circuit court of Lowndes county for obtaining money under false pretenses.

The indictment charges that, "on the 30th day of October, 1866, Pleasant Bowler, contriving and intending fraudulently and deceitfully to cheat and defraud one James Lull, clerk of the Columbus Colored Baptist Church, of his goods, chattels, and money, falsely and fraudulently did, knowingly and designedly, pretend to the said James Lull that he was a regularly ordained minister of the Baptist church, in good and regular standing; whereas he, the said William Bowler, was not a regularly ordained minister, in good and regular standing; and that the said Bowler, by means and color of said false pretences, did falsely and fraudulently obtain from said Lull the sum of $125, the property of said Lull.

The prisoner moved to quash the indictment, because the offense is not charged to have been committed feloniously. The motion was overruled, and defendant excepted.

On the trial, for the state, Noah Goff testified that he knew defendant. He came to Columbus in the spring of 1866, and preached. He left, stating that he was going to Europe on a mission for the benefit of the colored church. He returned to Columbus in the fall, remained ten days, and preached for witness' church. The deacons of the church asked him if he would accept the pastorate of their church. He replied that he would, if they would give him $500 a year, and his board and clothes, and pay him one hundred dollars in advance; that the church could consider of his proposition, and advise him of their decision at Aberdeen, where he contemplated going. He was advised by letter of the acceptance of the proposition, and was requested to come down and take charge immediately. He came and took charge of the church, and received $125 from James Lull. Prisoner continued in charge of his pastoral duties some three months, when, owing to difficulties in the church, he was discontinued. The cause of the difficulty was, that some of the members believed the prisoner to be a bad man, an impostor, and no minister. He promised, when he took charge, to show his credentials; and when requested to comply, he refused, only offering other papers entirely unsatisfactory. If the church had not believed defendant to have been a minister, they would not have employed him. The church first approached him to accept the pastorate. The mere representation that defendant was a minister was not sufficient to induce the church to pay him the money; it was given for his services, the same being the consideration. Witness asked defendant to show his credentials; he never showed them, but stated that he had them in his pocket. He professed to have lost a carpet-bag in Chicago, containing some valuable papers, but after this loss he told witness he had his credentials in his pocket.

Some complaint having been made about the church, it was closed on a night that defendant was to preach. Defendant became offended, and of his own accord went off, and carried some of the members with him. Witness afterwards invited defendant to join them on a sacramental occasion, but he refused.

Harrall Blewitt testified that defendant was a bad man; he

cursed and demeaned witness in an unchristian manner; witness had seen him under the influence of liquor.

W. H. O'Neal testified that he was the magistrate before whom the preliminary examination was had; that defendant made his voluntary statement, in which he stated that as he was passing through Chicago he lost his carpet-bag, and in it were his credentials as a minister of the gospel.

Roland Patterson, for the defense, testified that defendant discontinued his pastoral charge in consequence of a difficulty in which he was not censurable. The church split, the largest portion going with the defendant; that he is now the pastor of the dissenters, preaches regularly, and is believed to be a good man, with the love of God in his heart. Witness had not been deceived in defendant; that he talked like one educated in the ministry, and was familiar with the forms and ceremonies of the church.

This last witness was corroborated by a number of other witnesses.

Defendant offered, as evidence, his license to solemnize the rights of marriage by the probate court of Logan county, Ohio, in which he is described as a minister of the Baptist church. The state objected to its introduction, and the court sustained the objection, and defendant excepted.

Defendant offered to read as evidence a paragraph from one of the Richmond papers in reference to "Rev. Pleasant Bowler, pastor of the First Colored Baptist Church." The state objected; the court sustained the objection, and the defendant excepted.

The jury returned a verdict of guilty. A motion was made for a new trial and overruled. The defendant then sued out this writ of error, and brings his case to this court.

W. W. Humphries and *W. S. Barry*, for plaintiff in error.

1. The offense with which the prisoner is charged is a felony by the Rev. Code, 591, art. 105, and the indictment should charge that it was committed "feloniously." Wharton Am. Cr. Law, 399; Archbold Cr. Pl., 300.

2. The indictment does not charge the common law offense of

a cheat. It is a misdemeanor, and defined to be "the fraudulent obtaining the property of another by any deceitful and illegal practice or token, which affects or may affect the public, such as is public in its nature, and calculated to defraud numbers; to deceive people in general." 1 Lead. Cr. Cases, 11; 1 East P. C., 817; Russ. on Cr., 282; Wharton Am. Cr. Law, 2056; 3 Greenl. Ev., 84.

3. When the statute makes that a felony which before was only a misdemeanor, the misdemeanor is merged, and cannot thereafter be prosecuted. 1 Russell, 50; 3 Barn. & Ald., 161; 1 Pick., 39; 12 Mass., 455; 1 Pick., 45.

4. The *onus probandi* as to the falsity was on the state. "When the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." He must not only have the knowledge, but the means to testify and exhibit it to the court must be peculiarly within his reach. 1 Greenl. Ev., 111, 112; 35 Miss., 210; 5 Humph., 9.

5. The verdict was not warranted by the proof.

C. E. Hooker, attorney general.

ELLETT, J.:

This is an indictment against the plaintiff in error for obtaining money by false pretences under article 100, Rev. Code, 591.

The substance of the charge is that the accused falsely pretended to be a regularly ordained minister of the Colored Baptist Church in good standing, and thereby induced the church in Columbus to call him as their pastor, and to pay him the sum of $125.

A motion was made in the court below to quash the indictment on the ground that the offense is a felony, and was not charged to have been committed "*feloniously*." The offense of obtaining money or goods by false tokens or pretences, to any amount, however small, is made by the statute a felony, inasmuch as it is punishable by imprisonment in the penitentiary. Rev. Code, 630, art. 348.

By the 3d section of the article, creating county courts, approved November 24, 1865, page 68, the obtaining of goods,

money, or other property by false pretences, under the value of one hundred dollars, is made a misdemeanor, and may be prosecuted in the county court. This act so modifies the offense that it is now a felony only when the indictment charges the money or goods obtained to have been of the amount or value of one hundred dollars. The offense charged in this indictment is, therefore, a felony, the amount being over that sum. It is well settled that the word "feloniously" is indispensable in every indictment for a felony,[1] and hence the motion to quash this indictment ought to have been sustained.

It is suggested that the indictment may have been upheld in the court below as for a cheat at common law, by virtue of the 357th article of the Rev. Code, p. 630. But the common law misdemeanor of obtaining goods by false pretences is made by our statute a felony where the amount or value of the goods, &c., exceeds $100, and is, therefore, no longer indictable as at common law, the misdemeanor being merged in the felony. And, besides, in this case the indictment does not charge a cheat that would be indictable at common law. The article last alluded to cannot apply where the grade of the common law offense has been increased by statute from a misdemeanor to a felony, otherwise a person might be indicted for a misdemeanor and punished for a felony.

Nor is the defect cured by Art. 7, Rev. Code, 573, for the objection was taken by motion to quash the indictment before plea pleaded.

The instructions given for the state, and refused on behalf of the prisoner in the court below, are also made the subject of exceptions.

The jury were instructed, in substance, that if they believed the accused made the representations charged in the indictment, to wit, that he was a regularly-ordained minister of the Baptist church, and in good standing, and thereby obtained the money, they must find him guilty, unless he had shown that he was at the time a regularly-ordained minister of the

[1] Wharton Am. Cr. Law, 399; State v. Murdock, 9 Mo., 739; State v. Gilbert, 24 Mo., 365; Rex v. Gray, L. & C., 365; Mears v. Com., 2 Grant, 385; 2 Hawk., c. 25, § 55; 2 Hale, 184.

gospel, and in good standing in said church; and the court refused to instruct them, that the burden of proving these allegations was upon the state.

The general rule in cases of this kind is, that the falsity of the pretences must be clearly proved. Roscoe on Ev., 445. Exceptions to this rule are sometimes admitted in reference to the proof of negative averments. In regard to these, the rule is well defined in Easterling v. The State, 35 Miss., 210; where it is said: "The rule is, that when a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in showing it, the presumption of innocence or of acting according to law will not render it incumbent on the other side to prove the negative." The cases usually cited to illustrate this principle are where licenses are required by the local law to justify certain acts, as retailing, peddling, keeping tavern, and the like, and parties are indicted for doing the acts without the license. In such cases, the fact is peculiarly within the knowledge of the party; if he has the license, he can produce it without trouble or difficulty; and the license, if produced, is admissible in evidence, and is conclusive in his favor; and he is required to show it, or the inference will be drawn against him, that he has not obtained the necessary license. This is in derogation, to a limited extent, of the general presumption of innocence; but it is a rule of convenience, and, restrained within proper bounds, cannot well work injury or hardship.

But we do not think the present case can be embraced within its operation. No mode is prescribed by law for authenticating the proceedings of ecclesiastical bodies. Nobody is authorized to certify copies from their records, so as to make them evidence in courts of justice. Their certificates, in the form of credentials to ministers, would stand only on the footing of hearsay. The proceedings of such bodies can only be proved by sworn copies, or by witnesses who were present, or, perhaps, to a certain extent, by general reputation.

We have no judicial knowledge of the existence of any such body as the "Colored Baptist Church" in Mississippi, nor can we know where or how its ministers receive their ordination.

The accused in this case may have been ordained in a distant state. He may have exercised the functions of the ministry in Virginia, or Ohio, or both. It does not appear that he had resided in Mississippi before his advent in Columbus, in the fall of 1865. If ordained in another state, or if he had exercised his sacred office in other states, the certificate of his ordination would not be original evidence of the fact, nor could he compel the attendance or procure the depositions of witnesses. He may have peculiar knowledge of the fact, but it does not at all appear that he has any peculiar facility in making the proof of it.

And then, as to his good standing in the church, he is required also to prove that. We suppose that when the good standing of a minister in his church is spoken of, the question is whether he has been brought under censure or subjected to discipline by the authorities of the ecclesiastical body to which he belongs. To establish his good standing, he must show, not only that he has not been deposed or suspended from his office, but that there are no charges, and perhaps that there are no evil reports abroad concerning him. To require this of the accused, would be to throw upon him the proof of a negative of the most difficult and oppressive character.

We think the instructions of the court on this point were erroneous.

The court also charged the jury that "a reasonable doubt is not vague conjecture, nor mere hypothesis, but a sentiment clear and strong, arising in the mind of an enlightened and conscientious jury, which, upon a full survey of the facts, forbids its going forward to a conviction.

It is not easy to give a definite idea of what is a reasonable doubt. It is certainly not a mere conjecture or hypothesis, not founded on a reasonable view of the evidence. "That which amounts to mere possibility only, or to conjecture or supposition, is not what is meant by a reasonable doubt. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the evidence before them." Cicely v. The State, 13 S. & M., 210. We do not think it need be a "clear and strong" doubt; the proper word is "reasonable;" that is, just, rational, con-

formable or agreeable to that faculty of the mind by which it distinguishes truth from falsehood, and good from evil, and which enables the possessor to deduce inferences from facts, or from propositions. It implies a want of that fullness and completeness of proof which would enable the mind satisfactorily to draw the conclusion of guilt from the facts in evidence. "A sentiment clear and strong, which forbids the mind to go forward to a conviction" of the accused, might seem to favor the idea that there should be a reasonable certainty of his innocence in order to justify his acquittal. We think the expression used was too strong, and that the instruction was liable to the exception taken to it.

Another exception is, that the court refused a new trial. We have carefully considered the evidence, and do not think it was sufficient to sustain the verdict. The false pretence must be made with the design to obtain the money. That is clear, and the jury were so charged. The evidence for the state satisfies us that the pretences relied on, whether they were true or false, were not made with any design to obtain the money, or even to procure an employment as pastor of the church. The accused did not seek the place. The congregation, or their representatives, the deacons, as the proof shows, sought him, and invited him to become their pastor. He stated his terms, and left them to reflect upon the subject, and to write to him their conclusion. No doubt he had represented himself to be a minister, and if they had not believed him to be one, they would not have called him. Whether he was so or not, we do not undertake to decide. But so far as the proof shows, he did not take any step or use any means to induce the prosecutors to employ him as their preacher.

Moreover, the evidence also shows, that the money was not paid to him in consequence of his representation that he was a minister, but as compensation for services actually rendered by him in his ministerial capacity.

The representations or pretences are therefore not so closely connected with the act of obtaining the money, as if they were admitted to have been false, to justify a conviction on this indictment.

The judgment will be reversed, the indictment quashed, and the cause remanded for further proceedings, by a new indictment or otherwise, in the court below.

HENWOOD v. STATE, 41 Miss. R., 579.

RETAILING.

It is not necessary to the justification of a druggist selling spirituous liquor in less quantities than five gallons, within five miles of the University of Mississippi, that he should make and file an affidavit with the probate clerk, as required by the Rev. Code, 198, art. 8, before making the sale. A compliance with the act of February, 1860, ch. 284, is a justification.

Error to La Fayette circuit court. CLAYTON, J.

Walter & Scruggs, for plaintiff in error.

C. E. Hooker, attorney general.

HANDY, C. J.:

The plaintiff in error was indicted in the circuit court of La Fayette county, for selling spirituous liquors in a less quantity than five gallons, within five miles of the University of Mississippi, located in said county, without having filed the affidavit required by law, and not as a druggist, apothecary or physician, for medicinal, sacramental or culinary purposes, contrary to the form of the statute in such case made and provided. The accused moved to quash the indictment, on the same ground afterwards taken on the trial, and which will be hereafter stated; which motion was overruled. On the trial it was proved, on the part of the state, that the sale of the spirituous liquor was made by the accused within five miles of the University, to a person who purchased it for medicinal purposes, under the recommendation of physicians, and who, before the purchase, executed to the accused a certificate stating that he required the spirituous liquor exclusively for medicinal purposes, which was filed by the accused; that the accused was a druggist, and that the purchase was made of him as such; that the accused had never

filed any affidavit in the office of the probate clerk with reference to the sale of vinous and spirituous liquors.

At the instance of the prosecution, the court instructed the jury, in substance, that if they believed from the evidence that the defendant sold the spirituous liquor as charged in the indictment, in a less quantity than five gallons, within five miles of the State University at Oxford, they should find him guilty, unless the sale was made from a drug store, or he had, before the sale, made and filed in the office of the probate clerk of La Fayette county, an affidavit that he or his firm would not sell spirituous or vinous liquors in less quantities than one gallon, for any purposes other than for medicinal or sacramental purposes, without being satisfied from the evidence furnished him or them by the purchaser, that it is intended to be used for these purposes.

The motion to quash the indictment, and the rule stated in this instruction, present the question, whether it is necessary to the justification of a person selling spirituous liquor in a less quantity than five gallons, within five miles of the University of Mississippi, that he should make and file an affidavit as required by Art. 8, Rev. Code, 198, before making the sale.

The act of February 28, 1848, Rev. Code, 156, prohibits the sale by any person or persons whatever of vinous and spirituous liquors, in any quantity less than five gallons, within five miles of the University of Mississippi, with a proviso, that it should not extend to the sale of such liquors in less quantities, from drug stores, for medicinal purposes. It prohibits the granting of licenses by the board of police, to retail such liquors in less quantities than five gallons, within that locality. And it enacts severe penalties for the violation of the act. By the second section of the act of 3d February, 1857, Rev. Code, 161, it is provided that the fine for a violation of the act shall be not less than $500, and imprisonment for two months—both or either, at the discretion of the court. And the act of 10th February, 1860, chap. 284, further prohibits the sale, without the party selling shall first take and keep on file a certificate in writing, from the person to whom such liquor shall be sold, to the effect that it is exclusively for medicinal purposes, with the date of sale

and the person's name subscribed; and any person falsely so certifying shall be liable to the penalties imposed on the druggist by the act of 3d February, 1857; and the druggist is also made liable, if he knew that the certificate was false.

All these acts were passed with express and sole reference to the sale of spirituous liquors near the University of Mississippi, and they were clearly intended as special enactments regulating such sales in that locality. They purport to be such on their face, and they fully carry out that object.

The act, chap. 20, Rev. Code, 197, is an act "to regulate the sale of vinous and spirituous liquors generally, without reference to any particular locality. It provides how licenses to retail liquors may be obtained, and contains many regulations and restrictions, and some prohibitions as to the sale of such liquors. Its general character is one of regulation, not of prohibition. Among its provisions is Art. 8, which authorizes druggists, physicians and apothecaries, to sell such liquors in less quantities than one gallon, for medicinal, sacramental or culinary purposes, requiring satisfactory evidence from the party offering to purchase, that it was required for one of these purposes; provided, that every druggist and apothecary, before making such sale, should make and file an affidavit in the probate clerk's office, that he will not sell such liquors for said purposes, without being himself fully satisfied, from evidence furnished him, that such liquors are intended for said purposes, and no other. And the 15th article provides, that the act should "not apply to places where the sale is expressly prohibited by law, or is regulated by special enactment."

We think it clear that the provisions of this act were not intended to apply to the sale of spirituous liquors within five miles of the State University, because—1. The sale of such liquors, in that locality, was *prohibited* under severe penalties, and with very special and rigid limitations, by the acts passed with exclusive reference to that locality; and a general act passed to *regulate* and *authorize* the sale of such liquors, could not, with propriety, be held to apply to that locality where the subject had been matter of special and peculiar enactments, amounting to an almost total prohibition of the sale. 2. Such being the char-

acter of the legislation in relation to that locality, it is manifest that that locality is expressly excepted from the rule prescribed in Art. 8, by the positive terms of Art. 15.

We are, therefore, of opinion that the court erred in overruling the motion to quash the indictment, and in giving the instruction above stated for the state, and in modifying the first instruction asked for the defense.

The judgment must be reversed, the indictment quashed, and judgment entered here for the plaintiff in error.

JENKINS *v.* STATE, 41 Miss. R., 582.

LARCENY.

In criminal cases the *corpus delicti* must be proven by direct and independent testimony; and without such proof of the *corpus delicti*, evidence of a confession is inadmissible.

When counts for grand larceny, and for receiving stolen goods, are joined in the same indictment, and the jury return a verdict of guilty generally, and assess the value of the property at such a sum as reduces the offense under the first counts to petit larceny, the court cannot properly render a judgment on such verdict.

Error to Kemper circuit court. FOOTE, J.

Beauchamp & Welsh, for plaintiff in error,

Cited, 1 Greenl. Ev., 217; 5 Halst., 163–185; 1 Haywood, 524; Stringfellow v. State, 26 Miss., 157, 165–'6.

C. E. Hooker, attorney general.

ELLETT, J.:

The indictment in this case contains two counts—first, for the larceny of a mule of the value of $175; and, second, for receiving a mule of like value, knowing it to have been stolen. The offense is charged to have been committed on the sixth day of February, 1866, and the indictment was found at September term, 1866. The accused was found guilty, and the value of the mule assessed at $100. The sentence was three years' imprisonment in the penitentiary.

There was no evidence given, except of the confessions of the

accused, who was proved to have confessed having received the mule, knowing it to have been stolen, and having delivered it to another person "to put it through;" but there was no other evidence of the larceny besides the confession.

It is assigned for error that the court refused to charge the jury that the extra-judicial confessions of the accused are not sufficient to prove the *corpus delicti*, and that the fact of the larceny must be proved otherwise than by the confessions of the accused.

That this instruction ought to have been given is settled by the case of Stringfellow v. The State, 26 Miss., 157; Brown v. The State, 32 Miss., 433; and Same v. The State, 33 Miss., 347.

No judgment could properly be given on the verdict in this case. The accused was convicted generally on both counts of the indictment; but the jury having found the value of the property to be $100, it follows that the conviction on the first count was for a misdemeanor (act November 24, 1865, p. 75, § 20), and on the second count for a felony, the value of the property in cases against receivers of stolen property not being material. It was impossible, therefore, for the court to know what judgment to render.

The judgment will, therefore, be reversed, and the cause remanded for a new trial.

WHARTON v. STATE, 41 Miss. R., 680.

GRAND LARCENY.

A writ of error will not lie where there has been no judgment pronounced by the court below, not even where a judgment of imprisonment has been pronounced, and no term of imprisonment has been fixed.

On a writ of error, where no judgment has been pronounced, the prisoner will be remanded to the court below for the proper judgment.

When the circuit court pronounces a wrong sentence on a prisoner found guilty by a jury, on writ of error the judgment will be reversed, and prisoner released.

Error to Hinds circuit court. WATTS, J.

Frank Wharton, the plaintiff in error, was indicted for grand larceny in the court below, and was convicted.

The clerk of the circuit court of Hinds county certified, in the record of this case, that the judge of the court sentenced plaintiff in error to imprisonment in the penitentiary for five years from the 28th day of May, 1867, and that the failure to insert the term of imprisonment in the judgment of the court was clerical error on his part; that after the conviction of the plaintiff in error, the judge being sick, he gave him the following memorandum:

"THE STATE v. FRANK WHARTON. } Larceny. Sentenced to 5 years from the 28th day of May, A. D. 1868."

T. J. Wharton, for plaintiff in error,

Insisted that, for the error in the sentence of the court below in not fixing the term of imprisonment, there must be a reversal. It cannot be remanded to the court below to have the proper judgment entered, *nunc pro tunc*. *The term has elapsed* at which judgment should have been entered. The proper judgment cannot be entered here. Rex v. Kenworthy, 1 Barn. & Cress., 711; Rex v. Lookup, 3 Burrows, 1901; Rex v. Nichols, 1 Barn. & Ald., 21.

Where an erroneous judgment has been entered in the court below, the appellate court cannot render a new judgment, nor remand the cause for a proper judgment. The judgment must be reversed, and the prisoner discharged. King v. Ellis, 5 Barn. & Cress., 395; 11 Eng. Com. Law Rep., 259, reported in 2 Lead. Cr. Cases, 372. In this case, the court say, "It has been urged that the prisoner be remanded to the court below, and there receive the proper sentence, as was done in the case of Rex v. Kenworthy, 1 B. & C., 711; but there is this material distinction between the two cases: There, no judgment whatever had been passed in the court below; and this court, therefore, ordered the prisoner to be remanded to the inferior court in order to receive judgment. But here the court below has passed judgment; and that judgment being erroneous, we think there is no ground to send it back to be amended. The consequence is,

that the judgment pronounced by the court below must be reversed," and the prisoner discharged.

In the case of the King v. Bourne *et al.*, 7 Adolph. & Ellis, 3 Eng. Com. Law R., 36, 58, and also reported in 2 Lead. Cr. Cases, 376, the court delivered opinions *seriatim*, holding that that court could neither pass the proper sentence, nor send back the record to the court below in order that it might be done there, but that the judgment must be reversed and the defendants discharged.

In Massachusetts, it has been held that a mistake in any part of a criminal sentence, *however small*, vitiates the whole; and the prisoner is not liable to further procedure. Sheppard v. Commonwealth, 2 Metcalf, 419; Christian v. Commonwealth, 5 ib., 530. And it makes no difference whether the mistake makes in his favor, by way of an award of sentence less than the statute requisition, or against him, by way of a greater. Wilde v. Commonwealth, 2 Metcalf, 408; Strong v. Commonwealth, ib., 360. So in New York, 5 Denio, 97; also in Pennsylvania, Daniels v. Commonwealth, 7 Barr, 371; Drew v. Commonwealth, 1 Wharton, 279. See, also, Regina v. Harnett, Jebb's C. C., 302.

C. E. Hooker, attorney general,

Cited Rev. Code, 563, art. 11; Carr v. Copewood, 24 Miss., 256; Green v. State, 23 ib., 509; Porter v. Detterly, 1 S. & M., 163; Pender v. Felts, 2 ib., 535.

SHACKELFORD, C. J.:

The plaintiff in error was indicted for grand larceny, tried and convicted at the May term, 1867, of the Hinds circuit court for the first district.

The record shows the verdict of the jury, finding the plaintiff in error guilty.

The writing on the minutes, after stating the verdict of the jury, proceeds as follows:

"The State of Mississippi v. Frank Wharton, freedman. The defendant having been found guilty of the crime of grand larceny at the present term of this court, is now brought to the

bar of the court to hear his sentence. It is therefore ordered by the court that the said defendant be sentenced to imprisonment in the penitentiary at Jackson, in said state, for and during the term of —— years, and that said imprisonment commence from the 22d of May, 1867," &c.

There was a motion for a new trial, which was overruled by the court.

Exceptions taken to the ruling of the court in refusing plaintiffs in error a new trial.

Hence the case is brought to this court by writ of error.

There are a number of assignments of error; we shall only notice the last, which is as follows:

"The judgment and sentence of the court is erroneous, because no term of imprisonment is fixed."

Counsel for plaintiff in error contends that the judgment being erroneous, there being no time fixed in the sentence, the judgment must be reversed, and the term having elapsed at which he was convicted, the case cannot be remanded to the court below, to have plaintiff in error sentenced *nunc pro tunc;* therefore he must be discharged.

In support of these positions, counsel cites the court to the case of Key v. Ellis, 5 Barn. & Cress., p. 395, 2 Lead. Cr. Cases, 372.

In this case the defendant was convicted of larceny, which was punishable by the statute of 4 Geo. I, ch. 11, with transportation for *seven* years.

The court awarded sentence for *fourteen* years' transportation.

On error it was held that the appellate court could not render a new judgment, nor remand the cause to the court below for a new judgment, and discharged the prisoner.

This prisoner was discharged because there was a *wrong sentence and judgment.*

In the case of the plaintiff in error, there was no wrong judgment or sentence; he was not sentenced for a longer term than was prescribed by law for the offense of which he was convicted.

In what purports to be a judgment and sentence, appearing

in the record, there is *no time* fixed for his imprisonment; consequently it is a nullity.

It is entirely without substance; the most important and only requisite to constitute it a judgment or a sentence is wanting—the penalty prescribed by law for the offense of which plaintiff in error was convicted is omitted. Easterling v. The State, 35 Miss., p. 210.

The verdict stands in the court below without judgment.

The plaintiff in error is still in the custody of the law as an unsentenced convict.

There being no judgment in the case, this court has no jurisdiction of it. A writ of error will not lie when there is no judgment. Porter v. Detterly, 1 S. & M. Rep., 163; 2 ib., p. 27; 3 ib., 588; 11 ib., Loftus v. State, 358.

Therefore this cause must be dismissed from this court and remanded to the circuit court of Hinds county for the first district, with instructions to the judge to pronounce the sentence and the judgment of the law upon the verdict of the jury.

LEWIS v. STATE, 41 Miss. R., 686.

FORFEITURE OF RECOGNIZANCE.

Where a master enters into a recognizance for the appearance of his slave to answer an indictment for a felony, the subsequent emancipation of the slave discharges the master of the slave from the obligations of the recognizance.

Where the surety in a recognizance or bail-bond at the proper term of the court tenders his principal to the sheriff of the county, who receives him and imprisons him in a safe jail, from which he is released by irresistible force, it is a discharge of the surety.

The responsibility of a surety on a bail-bond or recognizance, ceases when he delivers the body of his principal to the sheriff of the proper county.

Error to Greene circuit court. HANCOCK, J.

George Wood, for plaintiff in error.

The court should not have sustained the demurrer. The first presents as a defense the emancipation of the slave by the paramount authority of the state. The plaintiff had entered into the recognizance only as the master of the then slave. In this

capacity, and in this only, he had a right to control him. He was not the slave's surety. But he was bound as principal in the recognizance, and in no other manner could he have been bound. He was bound to the state, and the state put it out of his power to perform. Hence he is entitled to be discharged from the recognizance. 2 Story on Contracts, 547, § 975. He is discharged by the act of the promise. Ib., 975.

The second plea avers the surrender to the sheriff and the release by federal authority of the slave David. If the plaintiff had a right to surrender him, then the defense is good. The recognizance, however, was taken in open court. Now, whether the plaintiff had a right to surrender him to the sheriff or not, yet it is contended he had a right to use the jail for his safe-keeping. If, after the use of due care on plaintiff's part, the prisoner escaped from jail without default in him, or if he was released by an authority that could not be resisted, it is submitted that he ought not to be made liable on his recognizance.

C. E. Hooker, attorney general.

1. The courts of Mississippi have ever held that though the negro was a slave, as a person he is responsible for crime, and when charged is triable and bailable precisely as white persons. In this case, therefore, the owner can claim justly no immunity in consequence of the manumission of the slave from any liability incurred.

The second plea, setting up that the defendant had been surrendered to the sheriff of the proper county, and had been confined in the jail of another county, and from thence he made his escape by interference of the military, presents a more plausible ground of defense, and as the facts are admitted by the demurrer, it must be assumed that they are true. Ordinarily, a surrender of a prisoner in good faith by his sureties, is regarded as a satisfaction of the bond, and I leave it to the decision of the court.

SHACKELFORD, C. J.:

This was a *scire facias* issued upon a judgment *nisi*, upon a forfeited recognizance, entered into by Edward A. Lewis, the

plaintiff in error, as the master of his slave David conditioned for David's appearance at the circuit court of Greene county, to answer to an indictment for an attempt to have carnal intercourse with a white female child, under the age of fourteen years.

The *scire facias* recites the recognizance, the day David was bound to appear, the forfeiture of the same at the October term, 1866, of the court, and the judgment *nisi*, &c., against plaintiff in error.

The plaintiff in error appeared and pleaded to the *scire facias*, four pleas.

Three of which are in substance as follows (the fourth, having relation to the kind of money the bond or recognizance was to be paid in, in case of forfeiture, we consider unnecessary to notice):

First. When plaintiff in error entered into the recognizance, he was the master and owner of the slave David, and as such entered into the recognizance.

That before forfeiture and judgment *nisi*, the people of the state of Mississippi, in convention assembled, in August, 1865, "ordered that slavery should no longer exist in the state of Mississippi," &c.

That, by that ordinance, the slave David was manumitted, and plaintiff lost control of the freedman David.

Second. That after the surrender of the Confederate armies, defendants took possession of the body of David, and had him at the court-house of said county of Greene, ready to be delivered to said court, to answer unto the state of Mississippi of the charge aforesaid, being the term of court at which said David should appear, by the conditions of the said recognizance, to wit: the October term, 1865, states there was no court held at that term, on account of the disturbed condition of the country; that he surrendered the said David to the sheriff of Greene county for safe keeping; that by reason of the insecurity of the county jail, David was, for better security, carried to the jail of Wayne county, where he was safely lodged to await his trial upon said charge, where he remained until he was forcibly released by the Federal soldiers quartered around and about

said jail. By being released as aforesaid, defendant could not have his body before the court," &c.

Third. That he had the body of the said David before the court, to deliver him up for trial to answer the charge, and tendered his body to the state, &c., at the term the *scire facias* was returnable.

The state demurred to all the pleas of the plaintiff in error. Demurrer was sustained by the court below. The plaintiff in error refused to plead—further, the judgment was made final by the court.

To revise this judgment, this writ of error is prosecuted.

All the facts, properly pleaded, are admitted by the demurrer of the state.

Are those facts an answer to the *scire facias*, or should the demurrer have been overruled by the court below?

This is the only question for the consideration of this court.

The plaintiff in error, as the master of the then slave David, entered into a recognizance to have him before the October term, 1865, of the circuit court of Greene county, to answer the state, &c.

There was a failure of the October term, 1865, of the said circuit court; consequently David could not be there tried. Plaintiff in error had his body ready to be delivered, to answer the charge, at the court-house, at that time, David voluntarily appearing.

When his master, the plaintiff in error, entered into said recognizance as his master (as appears from the recognizance), David was in his custody by the right of ownership and by law. He had absolute control of his person, and to keep him in any way he saw proper—by incarceration, or otherwise.

Before that term of the court, the sovereign power—the paramount law of the land—had put an end to the ownership of the plaintiff in error to David, his former slave.

His *status*, as slave, was changed; he was a freedman.

The right to control the person of David ceased with his emancipation; and any attempt on the part of his former master, the plaintiff in error, to exercise any constraint over the liberty of the freedman David would have rendered the plaintiff

in error liable to a criminal prosecution for attempting to exercise the rights of a master over his former slave.

David being a slave at the time his master entered into recognizance, he could not enter into any contract whatsoever; and not having entered into any bond or recognizance after he became a freedman, consequently was not bound by any obligation incurred in his behalf by his master.

No penalty—affecting his late master by a forfeiture—could reach David. He could appear to stand his trial or not, as he might see proper. He did appear, *as a freedman*, at the time his former master had bound himself he should appear.

Considering their changed relations towards each other, the plaintiff in error saw proper to instruct the sheriff of Greene county to take the man David into his custody, which he did in October, 1865. This was all the plaintiff in error could do under the circumstances. The responsibility of the plaintiff in error, it seems to us, ceased when he surrendered David to the sheriff.

He was precisely in the situation he would have been had there been no recognizance. If by law he was bound for the appearance of the freedman David after his surrender to the sheriff, plaintiff in error showed a sufficient excuse for the non-appearance of David in his second plea, showing that the prisoner David was released from a *secure* jail, where he had been placed for better security, *by an irresistible force*, the soldiers of the United States army, stationed around the jail in Wayne county.

As it was not the fault of the plaintiff in error, or of David, that he was not tried at the October term, 1865, of the court, the plaintiff in error should have been released from his recognizance when David appeared and was offered up to the state, as appears by the third plea, when the judgment *nisi* was made absolute against the plaintiff in error.

It was, therefore, error in the circuit court to sustain the demurrer to plaintiff's pleas to the *scire facias*. And this court, proceeding to render the judgment which should have been rendered by the court below, orders that the judgment of the circuit court be reversed, and that judgment be entered here over-

ruling the demurrer of the state, and that judgment be entered in the case for plaintiff in error.

HOUSE v. STATE, 41 Miss. R., 737.

RETAILING.

Statutes are not considered repealed by implication, unless the repugnancy between the provisions of the new and former statute be plain and irreconcilable.

Statutes relating to the same subject-matter must be considered together, and must be so construed as to give force and effect to all, if they be not conflicting.

In order to derive a power by implication, it must appear that the power thus sought to be implied is so necessary to the enjoyment of some specially-granted right, that without it, that right must fail.

By the amendment of the charter of the city of Holly Springs, passed November 19th, 1857, the mayor and aldermen have the exclusive right to grant license to retail vinous and spirituous liquors within the corporate limits. This power must be exercised in accordance with the requirements of the Rev. Code, 197–8, art. 4; and a grant of license without the petition of a majority of the legal voters resident within the city, is null and void.

Error to Marshall circuit court. CLAYTON, J.

The opinion of the court contains a sufficient statement of the facts of the case.

Featherton, Harris & Watson, for plaintiff in error,

Insisted that the Rev. Code, 197, regulating the grant of license to retail, and which requires the applicant to be recommended by a majority of the legal voters of the town, city, or police beat, as a suitable person, &c., does not apply to this case. That this general act has been repealed by a subsequent act, at least in its application to Holly Springs. The act of November 19th, 1857, amendatory of the several acts incorporating the city of Holly Springs, repeals this general act in its application to this city. See pamphlet acts of 1857, p. 91. The 29th section of the act gives the mayor and aldermen of Holly Springs the *exclusive right* to grant licenses for the sale of vinous and spirituous liquors within the corporate limits of the town, and for a period of more or less than one year, and on such terms and restrictions as the mayor and aldermen may prescribe. See sec. 29 of this act, page 96.

Here the *exclusive right is given* to the mayor and aldermen to license retail houses in the city of Holly Springs, for a longer or shorter period than one year, and on such terms and under such restrictions as they may prescribe. Everything on this subject is left to the discretion of the corporate authorities. They prescribe the terms on which licenses are to be granted, and impose the restrictions deemed necessary. The right, then, must be untrammeled and unrestricted in the hands of the corporate authorities. It cannot be clogged, encumbered, or in any way controlled or restricted by the provisions of the general law previously passed, requiring the applicant for license to be recommended by a majority of the legal voters, &c. The terms and provisions of this law are directly in conflict with the law insisted and relied on by the state. This law gives the mayor and aldermen the right to prescribe the terms on which licenses are to be granted, and to impose all necessary restrictions. The general law prescribes the terms and imposes the restrictions itself, and thus settles all questions which are left to the corporate authorities by the act of November 19th, 1867. Both laws cannot prevail; they are repugnant and irreconcilable. The terms employed by the legislature in the act of November 19th, 1857, show very clearly that it was the intention of the legislative mind to repeal all laws on the subject of licensing retail houses in the city of Holly Springs, and to vest all power on that subject in the mayor and aldermen of that city, to be exercised within its corporate limits. The terms employed, "*exclusive right*," are not without judicial interpretation. These terms are defined in the case of Ogden v. Gibbons, 5 Johns. Ch. R., 159, 160, 161, 162. See also Servis v. Beatty, 32 Miss., 84, 85. Indeed, there can be no doubt but that, according to the well-established rules of construction, the general law on the subject of retailing, which requires applicants for license to be recommended by a majority of the legal voters, &c., is repealed by the special and subsequent law of November 19th, 1857, so far as the city of Holly Springs is concerned. "It is well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former one, although it does not do so in terms; and even if the latter statute be not repugnant in its

provisions to the prior one, yet if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act." Sedgwick on Stat. and Const. Law, 124, 125, 126. The 29th section of the act of November 19th, 1857, was intended to prescribe the only rule on the subject of granting licenses to retail in the city of Holly Springs. The legislature evidently intended, when they used the term "exclusive right" to license, &c., to vest in the corporation of Holly Springs all power over this subject, to remove all obstacles, to repeal all laws in conflict with this 29th section of the act of 1857. The license granted to the plaintiff in error by the mayor and aldermen of Holly Springs, on the 2d of August, 1866, is therefore valid, and furnished the defendant with a good defense to this indictment.

C. E. Hooker, attorney general.

It is well settled that all statutes must be construed in connection with previous laws in relation to the same subject-matter, and that all such acts are to be taken together, as if they were one law.

Another well-settled rule is, that where rights are infringed and fundamental principles overthrown, and the general principles of the law departed from, a legislative intention to repeal a former law must be expressed with great clearness, and not left to doubtful implication. The subsequent act of 1857 does not abrogate the general provisions of the license law of the state, inasmuch as there is no repeal in terms, nor by necessary implication or intent, nor is there any negative of the rights, duties, and powers conferred upon corporate cities and towns by the general law. See 1 Black. Com., 89; 4 How. S. C. R., 53, 54; 1 Wisc., 513. Statutes are not considered to be repealed by implication unless the repugnancy between the new provisions and the former statute be plain and unavoidable. Planters' Bank v. State, 6 S. & M., 632. See also White v. Johnson, 30 Miss., 583; Mayor and Aldermen of the City of Jackson v. Bowman, 39 Miss., 671.

It is apparent that it was the purpose and intent of the legislature to vary and change the license laws, as to the city of

Holly Springs, to this extent, and to this extent only, that the corporate authorities of said city should have power to license "for a longer period than one year, under such restrictions as they saw fit to impose." But by no means was it intended to invest them with absolute discretion to disregard the will of the majority of the voters of said city as to who was the proper person to receive license, and much less did the legislature intend to clothe the mayor and board of aldermen of the city of Holly Springs with authority *to sell a monopoly* of the liquor trade to whom they might see proper, in contravention, and, indeed, in direct opposition to the general policy which prevailed throughout the state of Mississippi.

SHACKELFORD, C. J.:

The plaintiff in error was tried upon an indictment for selling vinous and spirituous liquors in a less quantity than one gallon (not being a druggist, and without license therefor) within the limits of the corporation of the city of Holly Springs, found guilty, and sentenced by the court. Motion for a new trial overruled, and exceptions taken to the ruling, and allowed by the court.

This writ of error is prosecuted to reverse this judgment.

There was an exception taken to the ruling of the court, in granting the only instruction offered by the state, which is made the ground for the first assignment of error: "That the court below improperly instructed the jury, at the instance of the state."

We shall only notice this ground of error, as the whole case turns upon this instruction.

The selling of the liquor, as charged, was proven and admitted.

The selling was justified by the plaintiff in error.

The plaintiff in error read to the jury a license issued to the plaintiff in error, John Bradley, and William C. Dunn (partners of plaintiff in error), on the 2d day of August, A. D. 1866, by the mayor and aldermen of the city of Holly Springs, granting said parties the "*exclusive right*" to sell vinous and spirituous liquors within the corporate limits of the city of

Holly Springs, for the term of *seven years* from the date thereof.

The license was issued to the plaintiff in error and his partners, in consideration of their undertaking to build a first-class hotel in the city of Holly Springs by the 31st day of December, 1867. This license was granted on the petition of the said J. J. House, John Bradley, and William C. Dunn, none of the citizens or legal voters of the city of Holly Springs joining in the said petition.

It was admitted that the petition was acted upon without lying over one month for the coming in of counter petitions, &c.

The plaintiff in error introduced and read to the jury a license issued to John Bradley, —— Phillips, and —— Farrington, by the mayor and aldermen of Holly Springs, dated the 18th of January, A. D. 1858, in consideration of said parties agreeing to erect a first-class hotel in said city by the first day of July, A. D. 1859.

It also appeared in said license last introduced that the petition for the grant of the same was *signed by a majority* of the legal voters of the city of Holly Springs, and that the petition was filed and laid over for consideration for one month, and the reception of counter petitions, before being acted upon.

This license to Bradley, Phillips and Farrington to sell vinous and spirituous liquors was for the term of ten years, the "exclusive right" secured to them "as a personal privilege, not transferable to another." John Bradley, one of the partners of plaintiff, is the same person named to whom the first license was issued. Bond offered also in evidence and read to the jury is conditioned according to the requisitions of the statute of Rev. Code, 197, 198, regulating the retailing of spirituous liquors in this state.

The instruction asked by the state, and given by the court to the jury, with reference to the foregoing evidence, and excepted to by the plaintiff in error, presents really the whole question for determination by the court. It presents fully the question of the validity of the license of 2d August, 1866, relied upon by the plaintiff in error as his defense to the indictment.

The instruction is in these words: "Unless the jury believe, from the evidence, that a majority of the legal voters of the city of Holly Springs petitioned the mayor and aldermen to grant to Bradley, House & Dunn a license to retail vinous and spirituous liquors for a term of seven years, recommending them to be of good reputation and sober, and suitable persons to receive such license, and that said petition was presented to said board and filed, and lay over one month for consideration, and for counter-petitions—that said license, so granted by said board of mayor and aldermen, of the 2d of August, 1866, would not authorize the sale by defendant of spirituous liquors in less quantities than one gallon in the city of Holly Springs, unless the jury believe that said liquor was sold by defendant as a druggist, and for medicinal or culinary purposes, and none other."

It is contended by the counsel for the plaintiff in error, with great earnestness, that "section 29," of the "act to amend the several acts heretofore passed by the legislature, incorporating the town of Holly Springs, in Marshall county," which is in these words:

"SEC. 29. The mayor and aldermen of said city shall have the exclusive right to grant licenses for the sale of spirituous and vinous liquors within the corporate limits of the same, and such licenses may be granted for a period less or more than one year, under such restrictions and terms as may be prescribed" —passed 19th of November, 1857—repeals so much of the general statutes regulating the sale of vinous and spirituous liquors in Rev. Code, pp. 197–8, as is prescribed in Art. 4 of said statute.

That this section 29, of the act of November, 1857, "gives all power over this subject of licensing retail houses, within the corporate limits of Holly Springs, to the mayor and aldermen; *that everything is left to the discretion of the corporate authorities.*"

"They prescribe the terms on which licenses are to be granted, and impose the restrictions deemed necessary. This right must be therefore untrammeled and irresistible in the hands of the corporate authorities."

We cannot recognize such power in the mayor and aldermen

of Holly Springs, as is given to them by the construction placed upon "section 29," by the distinguished counsel for plaintiff in error.

In construing this section 29, in question, if attainable, we should consider the reasons or considerations moving the legislature *at the time* of the passage of the act; and of the laws in force at that time.

By the Revised Code of 1857, p. 197, art. 2, "the boards of county police had the exclusive right to grant and issue licenses in their respective counties, *and in the towns of the state* where the inhabitants of the same did not reach the number of two thousand. That in towns where the population amounted to two thousand or more, if incorporated, the mayor and aldermen of said towns had the exclusive privilege of issuing such licenses."

If the town of Holly Springs had, at the time of the passage of the act amending its charter, on the 19th of November, 1867, two thousand inhabitants within its corporate limits, is it reasonable to suppose the legislature would have passed such an act? By the general law of the Code (p. 197) they had that power, being an incorporated town, without any special legislation on the subject.

No necessity existed for such legislation, if there were two thousand inhabitants within the corporate limits of Holly Springs.

The presumption is, that at the passage of the act in question, the town of Holly Springs had not two thousand inhabitants within its corporate limits, and that the act was passed as a special privilege and favor to the people of that town, allowing them to regulate the issuance of licenses for the sale or retailing of vinous and spirituous liquors exclusively.

The legislature, in the passage of such acts, is presumed to be directed and influenced by the public sentiment and wishes of the people asking for special legislation. If this is so, is it reasonable or reconcilable with common sense, to assume that the inhabitants of Holly Springs asked for the passage of an act empowering their mayor and aldermen to disregard the united will of the inhabitants constituting their corporation, giving the

mayor and aldermen the right to make contracts, grant licenses, rights and franchises, to individuals such as *they might select* to be the recipients of their bounty—securing to them *monopolies* and *exclusive privileges* in the sale of spirituous liquors at retail, &c., irrevocable, and for a long term of years?

No such assumption of authority could have been contemplated by the legislature when they passed the act; or by the people of Holly Springs, when they asked for their charter to be amended, making them a city, as has been exercised by their mayor and aldermen in the grant of the license in question.

The idea that the legislature intended to clothe the mayor and aldermen of the city of Holly Springs, by the passage of "section 29," with absolute power in the matter therein legislated upon, or that the inhabitants of the corporation should be at the mercy of their officers, irresponsible to their creators, cannot be tolerated.

There is nothing in the "act of November 19," which shows that there were two thousand inhabitants within the limits of the corporation, at the time of the passage of the act referred to. In the use of the language in section 29, "shall have the exclusive right to grant licenses for the sale of spirituous and vinous liquors *within* the corporate limits of the same," the legislature only intended to exclude the board of county police of Marshall county from the exercise of their legitimate jurisdiction within the limits of the town of Holly Springs, in case it should be found there were not two thousand inhabitants within its corporate limits.

If we are right in our view of this section of the statute, the corporation and the corporate authorities of the city of Holly Springs, as regards the right to issue licenses for the sale of spirituous liquors within its corporate limits, stand precisely in the situation of any incorporated town in the state with a population of two thousand inhabitants, except in this particular: "such licenses may be granted for a period less or more than one year, under such terms and restrictions as may be prescribed." This privilege of issuing the licenses for a period different from the general law is granted by section 29.

This court, in the case of The Planters' Bank v. State of

Mississippi, 6 Sm. & M. Rep., 632, lays down this rule for the construction of statutes: "Statutes are not considered to be repealed by implication, unless the repugnancy between the new provisions and the former statute be plain and unavoidable."

Another well-settled rule is, that all statutes must be construed in connection with previous statutes and laws in relation to the same subject-matter, and that all such are to be taken together, as if they were one law, and that if they can stand together, they will be so construed.

In what particular are the provisions hereinbefore cited, appearing in section 29, antagonistic or repugnant to the general prerequisites to be observed and performed before the issuance of a license to retail vinous and spirituous liquors, as is required by "article 4," pp. 197–8, Revised Code, which are, that the petition must be signed by a majority of the legal voters, residents within the corporate limits of the town in which the liquor is to be sold; that all such petitions, after being presented and filed, shall lie over one month for consideration; and the reception of counter-petitions, before being acted upon, &c.? We are unable to perceive anything that indicates repugnancy.

Then their right to exercise absolute power—a power not specifically granted by the charter—can only be derived by implication. It has been repeatedly held by this and other courts of last resort, that in order to derive a power by implication, *it must* appear that the power thus sought to be implied *is so necessary* to the enjoyment of some specially granted right, that without it that right must fail.

What is the granted right under this section 29, which must fail, unless the mayor and aldermen exercise absolute power, independent of the public will of the inhabitants of the corporation, in the grant of licenses, &c.? We can perceive none.

What right was saved by the grant of license to the plaintiff in error and partners for the term of seven years, giving them the *exclusive right* to sell vinous and spirituous liquors within the corporate limits of the city of Holly Springs? We are at a loss to perceive any.

This exercise of absolute power by the mayor and aldermen

of Holly Springs, in granting the license to plaintiff in error, *et al.*, was not derived by implication. Therefore the issuance of the license in question without observing the prerequisites prescribed in Art. 4, Rev. Code, 197-8, was a plain and palpable violation of their public duty.

They had no power, using the language of Justice Harris in his opinion in the case of The Mayor and Aldermen of the City of Jackson v. James H. Bowman, 39 Miss., "to sell a discretion and authority specially delegated to it, to be used for the public good, and thereby prevent itself from the further exercise of such discretion and authority, from time to time, as the exigencies of the country might demand. It was not in its power, by contract, to divest itself of this public official duty irrevocably for a term of years, for private benefit or local advantage."

The provisions of this license, the contract, and the consideration of the same, are in all respects as objectionable as those in the case of The Mayor and Aldermen of the City of Jackson v. James H. Bowman.

The mayor and aldermen of Holly Springs could not dispense with the prerequisites prescribed by the general act, pp. 197–8, Rev. Code, art. 4, and their action in the grant of the license in question was without authority, in violation of Art. 4, referred to, and therefore void.

Though not authority binding on their successors, the first mayor and aldermen, elected within two months after the passage of the amended charter, November, 1857, in the grant of the license to Phillips, Bradey, and others, construed their powers and their duty to the inhabitants of the corporation correctly. That license, it will be seen, was granted in conformity with the requisitions of "Art. 4, p. 198, Rev. Code."

We are of opinion, that the view of the law applicable to the testimony in the case, taken by the able jurist who presided at the trial in the court below, was correct, and that the instruction objected to was properly given. The judgment should not be disturbed.

Let the judgment be affirmed.

LICKS v. STATE, 42 Miss. R., 316.

ILLICIT RETAILING OF INTOXICATING DRINKS.

Under the act of the legislature of November the 4th, 1865, the corporate authorities of all cities and towns in this state have the exclusive right to grant or refuse license to retail vinous and spirituous liquors within their corporate limits. Upon license so granted, the boards of police of the county may order and fix the amount of taxes to be assessed and collected.

Error to the circuit court of Yalobusha county. COTHRAN, J.

Walthall and *Golladay*, for plaintiff in error.

The proof established that in January, 1867, the plaintiff in error retailed vinous and spirituous liquors in the incorporated town of Water Valley, in Yalobusha county. It was admitted on the trial by the district attorney, representing the state, that plaintiff in error was regularly licensed by the corporate authorities of Water Valley, to retail in that town for twelve months, from October 11th, 1866. It was admitted by the plaintiff in error that he had never applied to the board of police of the county for license to retail, nor to fix the tax to be paid by him, and that he had paid no such tax or license, none having been demanded or fixed.

We contend that under the "Act to confer additional powers upon all incorporated cities and towns in the state of Mississippi" (acts of 1865, p. 157), the license from the corporate authorities of Water Valley was sufficient for the protection of plaintiff in error, without one from the board of police. From the first section of that act, it seems to have been the intention of the legislature to enlarge the powers of the corporate authorities of cities and towns, as to drinking saloons, billiard-tables, &c., within their limits, and to vest them with full authority for their "control and regulation," including the power to "license or refuse to license" the same.

The proviso to that section makes parties licensed liable for "all state and county taxes which may be imposed from time to time, and such license as shall be ordered and fixed by the respective boards of police of the proper county." While the meaning of this section is somewhat obscure, it certainly, when

considered with the eighth section, transfers from the boards of police to the corporate authorities of cities and towns authority to grant or refuse licenses to retail within their limits. A license so granted, if it have any effect, must amount to an authority to the licensed party to retail in a city or town; just as one granted by the board of police would give him authority to retail elsewhere in a county.

And while the licensed party is *liable* for such license as may be ordered and fixed by the board of police, and can be made to pay the same when ordered and fixed, he is certainly not liable until it is done. In this case, none has been fixed or demanded, and the plaintiff in error in that regard is not in default, there being no duty imposed on him till the board has taken action in the premises. Suppose the board should never act: would the party who has paid his money to the corporate authorities for the license granted by them, lose what he has paid, without the power, under the law, to avail himself of the privilege? Suppose it should act six months after the corporate authorities grant the license: would the privilege (which cannot be granted for a longer or shorter period than one year—Code, p. 198, art. 6) date from the action of the corporate authorities or the board? If the latter, then it would not expire till twelve months from that date; and in that event, for the last six months of the time the licensed party would retail in a town or city without license from the corporate authorities, the license granted by the latter having expired twelve months from *its* date.

It must have been the intention of the legislature to authorize town and city authorities to grant a party such a license as would give him the right to retail as soon as granted, taking effect from its issuance; but the party to pay afterwards taxes imposed, and the license, to the county, *when* ordered and fixed. Any other construction leads to confusion.

C. E. Hooker, attorney general, and *W. R. Barksdale*, for the state.

I. The whole of the evidence offered by defendant in the court below which was excluded, as well as the instructions

asked by him through counsel which *were* refused by the court below, were *excluded* and *refused* upon the legal view that the act of 1865, p. 157, entitled "An act to confer additional powers on cities and incorporated towns," does not repeal or in any manner affect the general retailing act of the Revised Code of 1857, p. 197 *et seq.*

II. The act of 1865, p. 157, Sheet Acts, does not touch or aim to touch the general law of 1857. Rev. Code, p. 197 *et seq.*

It only gives to incorporated towns, in which houses may be licensed by the boards of police, power to regulate, control, and even close up such houses. It is a further restriction on the sale of vinous and spirituous liquor in less quantity than one gallon, the discretion to exercise which is given to the cities and incorporated towns.

III. The act of 1865, purporting only to be "An act to confer on cities and incorporated towns additional powers," in the very first section gives to such cities and towns power to pass ordinances not in conflict with the laws and constitution of the state and of the United States, thus recognizing all state laws on the subject of retailing.

IV. There are no express words of repeal of the law of 1857 contained in the law of 1865. It only repeals the laws in conflict with it; and this would have been done without the last section, since all previous laws so repugnant to it that both could not stand, would have been repealed by a well-known rule of statutory construction.

V. And this brings me to the last proposition to be noticed in the case; that is, whether the law of 1865 is so repugnant to the law of 1857 that both cannot stand, and the latter is therefore repealed.

Repeal by implication is not favored, and if both can be so construed that both may stand, this will be done. Richards v. Patterson, 1 Geo., 583; McAfee v. Southern R. R. Company, 7 Geo., 669.

Between the acts of 1857 and 1865 there is perceived not the slightest repugnance or incongruity. The act of 1865 is a *cumulative* restriction on the sale of vinous and spirituous liquor given to cities and incorporated towns.

If it repeals any part of the act of 1857 it repeals all, and therefore sweeps away all the cautions and wholesome restrictions of that law, which seem so well calculated to keep the *franchise* of selling in the hands of men of approved fitness.

It dispenses with the petition; it dispenses with the petition remaining on file a month; it dispenses with the bond required by Art. 5, p. 198, Rev. Code; it dispenses with the payment of at least $200, the lowest rate at which the board can fix it; and thus the effect of such a construction is to raise the floodgates, and give full sweep to that which the legislature has long regarded as a great source of public mischief—the sale of vinous and spirituous liquor in less quantity than one gallon.

SHACKELFORD, C. J.:

This was a conviction in the circuit court of Yalobusha county, at the April term, 1867, for violating the liquor law of 1857. Revised Code, p. 197 *et seq.*

During the progress of the trial there were various exceptions taken to the rulings of the court excluding from the jury testimony offered by the plaintiff in error; also a number of exceptions were taken, based upon the action of the court in charging the jury, at the instance of the state, and for refusal to grant instructions asked for by the plaintiff in error.

There was a motion for a new trial for the following reasons:

"1. The court erred in excluding the testimony offered by defendant.

"2. The court erred in giving the instructions asked for the state.

"3. The court erred in refusing to give the instructions asked for the defendant.

"4. The jury found contrary to law and evidence."

This motion was overruled by the court, and exceptions taken to the ruling of the court in refusing the motion, and hence the case is here for revisal on writ of error.

The state proved that Licks, the plaintiff in error, in the incorporated town of Water Valley, in said county of Yalobusha, sold vinous and spirituous liquors to divers persons, in less quantities than one gallon, for money; and that he was not

either a druggist, apothecary, or physician; that this selling occurred in January, A. D. 1867.

The district attorney admitted to the jury that the defendant Licks was regularly licensed by the corporate authorities of said town on the 11th day of October, 1866, to retail vinous and spirituous liquors in said town of Water Valley, for one year from that date, and that Licks paid therefor the sum of $250, and waived proof of the admissions.

The plaintiff in error admitted that he had never applied to the board of county police of said county for license to retail liquors, &c., in said town, and that he never applied to the said board to fix any tax to be paid by him, and that he never paid any such tax or license, and that none had been fixed or demanded of him by the said board of police.

We do not consider it necessary here to bring in view the testimony offered by the plaintiff in error, which was excluded by the court, although made a ground for a new trial, as the principal part of the same was the legal opinions of counsel, taken by the plaintiff in error, for his future guidance in the premises, after he had obtained his license from the municipal authorities of the town of Water Valley, to show the *bona fides* of his intentions and acts.

We consider that the whole case turns upon the construction to be placed upon the act of the legislature passed on the 14th day of November, 1865. Pamphlet Acts, p. 157-8.

The court gave the following instructions for the state:

"1. In order to authorize the defendant legally to retail vinous and spirituous liquors in less quantity than one gallon, in an incorporated town of less population than two thousand inhabitants, it is necessary that he should have first made application to the board of county police of Yalobusha county for such license, and that he should have paid such license as was ordered and fixed by the said board on his application, unless the board of police had ordered and fixed a license to be paid by all retailers in the town of Water Valley, where defendant sold; and then it was a condition precedent to defendant's right to sell legally in less quantities than one gallon, that he should have paid the license so ordered and fixed before proceeding to sell.

"2. The payment of the license ordered and fixed by the board of police was a condition precedent to the defendant's right to sell legally; and if the jury believe from the evidence he sold in less quantities than one gallon, before the payment of such license so ordered and fixed, then the law is for the state, and they will find the defendant guilty as charged."

The giving of these instructions is made the grounds for the first assignment of error.

In support of the legality of these instructions, counsel for the state contend that the act of 1865, above referred to, does not, either by implication or otherwise, repeal the provisions of the Revised Code, p. 197. That it only gives to incorporated towns in which houses *may be licensed by the boards of police*, power to regulate, control, and even close up such houses. And that it is a further restriction on the sale of vinous and spirituous liquors in less quantities than one gallon, the discretion to exercise which is given to the cities and incorporated towns of the state.

It seems that the act of 1865 does not add to or take any powers from the municipal authorities of cities or incorporated towns with a population of two thousand inhabitants. By the act in the Revised Code, p. 197, art. 2, the exclusive right to grant licenses to sell liquor in less quantities than one gallon, within their corporate limits, is given. The act of 1865 enlarges the powers of incorporated towns with a population of less than two thousand inhabitants. The boards of police, by virtue of Art. 3, p. 197, of same act, had, until the passage of the act of November 14th, 1865 (Pamphlet Acts, p. 157-8), *the exclusive right or authority to grant licenses in incorporated towns with* a population of less than two thousand inhabitants.

This act was intended to enlarge the powers of the municipal authorities of incorporated towns with populations of a less number than two thousand. It is true the *people* of incorporated towns with a population less than two thousand had the power, by petitioning the boards of county police of their respective counties, to grant or not to grant licenses within their corporate limits. The corporate authorities of such incorporated

towns had no voice in the granting of such licenses by the boards of police.

The act of 1865, under consideration, confers upon the municipal authorities of incorporated towns, with populations of a less number than two thousand, the absolute power "*to license or refuse to license, as they may judge expedient.*"

This license has to be granted upon the same terms and conditions as are prescribed in the general act of the Revised Code, p. 197–8, art. 5, which regulates the grant of licenses in cities with a population of two thousand inhabitants, in police districts of the counties and incorporated towns of the state with populations of less than two thousand. This act of 1865 places incorporated towns of less than two thousand inhabitants in the same position with incorporated towns or cities with a population of two thousand, as to the right to grant licenses within their corporate limits, subject, however, to the *proviso* in the act of 1865.

Can the boards of police now license a retail liquor-house, as provided for in Art. 3, Revised Code, p. 197, in any incorporated town with a population of less than two thousand, without the consent of the municipal authorities of such incorporated town; or can they grant such license at all unless the municipal authorities of such towns first grant a license? We think they cannot.

Such grant of license could only be made where the boards of police have concurrent jurisdiction over the matter with the corporate authorities. It is clear that this act does not give to the boards of police concurrent authority with the municipal authorities of these towns to issue or grant license without the consent of the authorities of said towns embraced by this act. If they cannot grant such license to a party before a license is issued by the municipal authorities of the town, it follows that the exclusive right to grant or refuse the license in the first instance belongs to the municipal authority of the towns. The authority of the boards of police to license at all is entirely dependent upon the will of the corporate authorities, expressed either by a grant or a refusal of license to one of its inhabitants to retail liquor within their corporate limits; if refused, the boards of

police have no power to license. Therefore, we think that so much of Art. 3, Revised Code, p. 197, as is in conflict with the act of 1865 is repealed, and that the boards of police have only the right left them by the act of 1865 to license retail houses in incorporated towns with a population of less than two thousand to the same individuals who are licensed by the municipal authorities. In other words, the exercise of the licensing power left them by the act of 1865 is entirely dependent upon the will of the corporate authorities of incorporated towns; without they license in their corporate limits, the jurisdiction of the board of police is absolutely suspended.

It is insisted by the state that, although the plaintiff in error obtained his license from the municipal authorities of the incorporated town of Water Valley, he could not sell under such license until he obtained a license from the board of county police.

We do not concur with the attorney for the state in this view of the case. We have considered how far these acts of the Revised Code and the act of 1865 are in conflict, and how far they can stand together.

It is true, as contended for, that the recipient of a license under the act of 1865, from the municipal authorities of the incorporated town of a population less than two thousand, is liable, in the language of the act of 1865, for "*such license as shall be ordered and fixed* by the respective boards of police of the proper county." The legislature evidently meant, in the use of this language, to give the boards of police power to fix a sum for the party already licensed by the corporate authorities to pay into the county treasury. Nothing was left to the boards of police except the *discretionary* power to tax or fix a price to be paid in addition to the county for the license of the boards of police. The requisitions provided for in Art. 5, Revised Code, p. 198, had to be first complied with before license could be granted by the municipal authorities of Water Valley to the plaintiff in error. This is presumed to have been done. Then there was nothing left for the board of police of Yalabusha county to do, except to name and assess the sum the plaintiff in error should pay in addition to what he had already paid.

The board of police of said county could have fixed, either before or after the grant of the license by the authorities of Water Valley to the plaintiff in error, the amount he should pay for the additional license; or it could have assessed an amount to be paid by every retailer in Water Valley, acting under the authority of the corporate authorities.

If this had been done, and the amount of the license assessed and fixed by the board of county police of Yalabusha county, at any time previous to the sale of the liquor for which plaintiff in error was indicted and committed, such a state of facts would have made an entirely different case from the one before us.

When such a case arises, it will be time enough then to decide what effect an assessment of an amount to be paid for license to a county, by a board of police, will have upon the rights and liabilities of a party who holds a license from the municipal authorities of an incorporated town of a population of less than two thousand.

It was no fault of the plaintiff in error that the board of police of Yalobusha county failed to fix an amount of money to be paid for a license from that body, to retail liquors, &c., in the town of Water Valley.

Until such license was ordered or fixed by the board of police of Yalobusha county, the plaintiff in error was violating no provision of the General Liquor Law (Revised Code, p. 197), or of the act of November 14, 1865; and consequently was guilty of no offense when he sold the liquor for which he was convicted. By the act of November, 1865, the municipal authorities of incorporated towns have authority "to pass such laws and ordinances not inconsistent with the laws and constitution of the state and of the United States, as they shall deem expedient for the control and regulation of all drinking-saloons within their corporate limits."

The legislature intended by this act to confer absolute and exclusive power upon the people and municipal authorities of incorporated towns, to regulate the issuance of licenses to drinking-saloons, and to provide the prerequisites to be observed before issuance of licenses. In the absence of such municipal legislation, the provisions of Art. 5, Revised Code, p. 198, as we

have before said, is the law regulating the issuance of licenses to retail liquor-houses in incorporated towns and cities. There is no proof in this record showing that any of the prerequisites to the grant of license under Art. 5, Revised Code, p. 198, had been omitted by the plaintiff in error, in the license granted to him on the 11th day of October, 1866.

Then upon what principle is it claimed that the board of county police has the right to require any conditions precedent to be complied with by the plaintiff in error, after he has complied with all the requisitions of the law, and the conditions prescribed by the municipal authorities of Water Valley, before the board should fix the amount to be paid for the county license to him, and before he should be permitted to retail under his license from the authorities of Water Valley.

The power in the act of 1865 is given to the corporate authorities to revoke any license granted by them; this is the power granted in Art. 7, p. 198, Revised Code, of the General Law, to cities and incorporated towns of two thousand inhabitants, and to the boards of police. This power of the board of police is now conferred upon the authorities of incorporated towns of less than two thousand inhabitants. Could a party whose license had been revoked or annulled by the corporate authorities go on and sell or retail liquor under the license granted him by the county police? It would be absurd to maintain that he could. If this could not be done, where can the authority be found in the boards of police giving them the right to control the action of the corporate authorities by prescribing conditions precedent to be observed by them in the grant of licenses? The law and their ordinances they are alone to observe.

If we are right in these views of the statute of 1865 and the General Liquor Law, the boards of police are debarred from all control over the subject-matter in question, in incorporated towns, except so far as to fix the amount to be paid the county for such additional license.

We consider the first assignment of plaintiff in error well taken, and the court erred in giving the second and third instructions asked by the state.

The second assignment is: "The court erred in refusing the first, second, and third instructions asked on behalf of the plaintiff in error."

We deem it unnecessary to consider the first instruction refused by the court, as it refers entirely to the testimony of the plaintiff in error, ruled out by the court, which we have considered unnecessary to notice. The second instruction refused is: "If the jury believe from the evidence that the defendant was regularly licensed to retail by the corporate authorities of the town of Water Valley, and that the same was an incorporated town; that no tax on him or on retailers generally in said town had been levied, fixed, or assessed by the board of county police of Yalobusha county, then the defendant was authorized to retail during the time covered by such license."

"3. Under the law in force in October, 1866, and from that time, the corporate authorities of Water Valley had and have authority to license parties to retail in said town; and when such license is granted, the party so licensed has the right to retail in said town without first obtaining a license from the board of police, but is bound to pay such tax as may be fixed, levied, or assessed by said board." These instructions, we think, contain a correct interpretation of the statute of 1865, in connection with the General License Law of 1857 (Revised Code, pp. 197–8), and should have been given, and it was error to refuse them.

The third assignment of error is, that the court erred in refusing to grant a new trial. We have, in the consideration of the questions previously discussed, disposed of the grounds set forth in the motion for a new trial. The motion should have been granted by the court on all the grounds except the first, upon which we give no opinion, for reasons previously stated.

Many grave questions may possibly arise touching the legality of the "*proviso*" in the act of November 14, 1865, when it comes to be construed in connection with the powers therein previously conferred upon the municipal authorities of incorporated towns of a population less than two thousand; conflicts of jurisdiction between these authorities may occur, producing results affecting the rights of individuals, &c. We do not

intend, by anything we have said in the discussion of the case before us, to intimate any opinion upon probable questions that may arise under the act of 1865, and the General Law of Revised Code, pp. 197–8, suggested above.

For these reasons the verdict must be set aside and the judgment reversed, and a new trial awarded, and the case remanded.

WILLIAMS *v.* STATE, 42 Miss. R., 328.

ASSAULT AND BATTERY WITH INTENT TO KILL.

All indictments upon statutes must pursue the precise and technical language employed in the statute in the definition or description of the offense. 5 How., 242; 13 S. & M., 263; 23 Miss., 525; 26 Ib., 51.

An indictment for an assault and battery with intent to kill and murder, must state that the offense was committed with a deadly weapon, or other means or force likely to produce death.

Error to the circuit court of Davis county. HANCOCK, J.

At the March term, 1869, of the circuit court of Davis county, plaintiff in error was indicted for an assault and battery with intent to kill and murder Dick Smith. The indictment is in the following words: "The grand jurors elected, &c., present that Shabe Williams, on the 19th of March, 1866, in the county of Davis aforesaid, in and upon one Dick Smith, wilfully, feloniously, and of malice aforethought an assault did make, and him the said Dick Smith did strike, cut and wound, with intent of him, Shabe Williams, wilfully, feloniously, and of malice aforethought, to kill and murder the said Dick Smith, against the peace and dignity of the state of Mississippi."

Plaintiff in error, by his counsel, moved to quash the indictment, because it did not state that the assault and battery was made with a deadly weapon, or other means or force likely to produce death. The motion was overruled, and plaintiff in error excepted. Plaintiff in error pleaded not guilty. The cause was submitted to a jury, who returned a verdict of guilty as charged in the bill of indictment.

A motion for a new trial was overruled, and plaintiff in

error sentenced to imprisonment in the penitentiary for two years.

Geo. Wood, for plaintiff in error.

C. E. Hooker, attorney general.

PEYTON, J.:

The plaintiff in error was indicted at the March term of the circuit court of Davis county, for an assault and battery upon Dick Smith, with intent to kill and murder him; and at a subsequent term of said court he was tried, convicted, and sentenced to imprisonment in the penitentiary. The plaintiff now prosecutes this writ of error, and assigns several errors, the last of which is, that the court erred in overruling the motion in arrest of judgment. In this we think the court erred.

The indictment does not charge that the plaintiff in error committed an assault and *battery* with a *deadly* weapon, or other means or force likely to produce death. These facts should be stated in the indictment for this offense under our statute.

It is necessary to specify on the face of the indictment the criminal nature and degree of the offense, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offense, for the following reasons:

1. In order to *identify* the charge, lest the grand jury should find a bill for one offense, and the defendant be put upon trial for another, without any authority.

2. That the defendant's conviction or acquittal may inure to his subsequent protection, should he be again questioned on the same grounds; the offense, therefore, should be defined by such circumstances as will, in such case, enable him to plead a previous conviction or acquittal of the *same offense*.

3. To warrant the court in granting or refusing any particular right or indulgence which the defendant might claim as incident to the nature of the case.

4. To enable the defendant to prepare for his defense in the particular case; or, if he prefer it, to submit to the court, by

demurrer, whether the facts alleged (supposing them to be true) so support the conclusion in law, as to render it necessary for him to make any answer to the charge.

5. Finally, to enable the court, looking at the record after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment.

It is a general rule, that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it; they must pursue the precise and technical language employed in the statute in the definition or description of the offense. Starkie on Crim. Pleading, 249; 1 Chitty's Crim. Law, 280–283; Ainsworth v. The State, 5 How., 242; Anthony v. The State, 13 S. & M., 263; Ike v. The State, 23 Miss., 525; Riggs v. The State, 26 Miss., 51.

For these reasons we think the indictment was insufficient to warrant the judgment of the court below.

The judgment must therefore be reversed, the indictment quashed, and cause remanded for further proceedings under a new indictment.

SHINES v. STATE, 42 Miss. R., 331.

LARCENY.

Under an indictment for grand larceny, if the jury find the defendant guilty, they must also find the value of the property feloniously taken.

On the trial of an indictment for grand larceny, where the jury return a verdict of guilty as charged in the bill of indictment, but fail to find the value of the property feloniously taken, the court has no power to fix the value of the property and the grade of the offense.

S. was indicted for the larceny of two yearlings, of the value of thirty dollars. The jury returned as their verdict, "Guilty as charged in the bill of indictment." *Held:* That the failure of the jury to find the value of the property stolen was error, which the court had no power to correct.

Error to the circuit court of Madison county. CAMPBELL, J.

At the September term, 1867, William Shines (f. m. c.) was indicted for the larceny of two "yearling calves, of the value

of fifteen dollars each, and in the aggregate of thirty dollars in value, being the personal property of John D. Hart." At the same term of the court the plea of "not guilty" was entered. The issue joined between the state and Shines having been submitted to a jury, they returned the following verdict: "We, the jury, find the defendant guilty as charged in the indictment."

The counsel of Shines moved to set aside the verdict of the jury; the grounds of the motion do not appear in the record. The motion was overruled, and the following judgment entered: "A jury of good and lawful men having found the defendant, William Shines, guilty as charged in the bill of indictment, it is ordered by the court that a verdict of petit larceny be entered upon the minutes." It is further ordered that defendant be fined the sum of twenty-five dollars, and pay costs, and remain in custody until fine and costs be paid."

A motion for a new trial made and overruled. Writ of error to this court. The errors assigned here are:

1. The court erred in overruling the motion for a new trial.

2. The verdict of the jury was not warranted by the evidence.

3. The court erred in the sentence passed on plaintiff in error, the same not being in accordance with indictment and verdict of the jury.

C. Shackleford, for plaintiff in error.

A. R. Johnston, for the state.

The value of the property was shown by the testimony. The plaintiff in error was indicted for grand larceny, and on the principle the greater includes the less, it was an indictment for petit larceny. The court below in its sentence treats the verdict under the evidence as showing a case of petit larceny. The defendant is convicted by the verdict of a theft. The offense is either grand or petit larceny. Can plaintiff in error be heard to complain that his sentence is too light?

The proof of guilt is strong, certainly sufficient to authorize the verdict. But the court will never set aside the verdict in

a case like this, unless there is a great and manifest preponderance of evidence against the verdict. Jenkins v. Whitehead, 1 S. & M., 157; Ledlore v. Justice, 1 ib., 381; Van Vacter v. Brewster, 1 ib., 400; Ellzy v. Stone, 5 ib., 20.

JEFFORDS, J.:

The plaintiff in error, Shines, was indicted before the circuit court of Madison county, in this state, for the crime of grand larceny, was tried at the September term, 1867, of that court, and a verdict rendered against him of "guilty as charged in the indictment."

There are three assignments of error, but as the third assignment must be decisive of this case, we pass over the others, and proceed to examine this alone, which is, that "the court erred in the sentence passed on appellant, the same not being in accordance with the indictment and verdict of the jury."

The indictment alleged the value of the property stolen to be thirty dollars.

The proof, as embodied in the bill of exceptions, discloses the fact that Shines stole a yearling calf of the value of from five to seven dollars, which, under our statute, is petit larceny.

On the 7th day of October, 1867, the jury returned a verdict of "guilty as charged in the indictment," without finding the value of the property alleged to have been stolen, and without specifying the grade of the offense. On the following day the defendant moved the court to set aside the verdict of the jury; which motion having been heard and considered, was overruled by the court. The same day the court "ordered that a verdict of guilty of *petit larceny* be entered upon the minutes," and thereupon sentenced the defendant to pay a fine of twenty-five dollars and the costs of prosecution, and to remain in the custody of the sheriff until the fine and costs should be paid.

There is, of course, no question whatever but that the indictment charging grand larceny embraced also the charge of petit larceny; and there is no doubt that if the testimony would not justify a conviction of the greater, the jury might have returned a verdict of guilty of the lesser offense.

It was the duty of the jury to find whether an offense had

been committed, and if so, to fix the value of the property stolen, and whether it was grand or petit larceny. Joseph Thomas and Pendleton Thomas v. State, 5 How., p. 32; Dick v. The State, 3 Ohio State.

If the verdict was uncertain, ambiguous, or informal, the court had the most unquestionable right to direct the jury to correct the form of their verdict before discharging them. But we have been unable to find any precedent which authorizes the court to usurp the power and place of the jury, and do that which the jury alone are empowered by the law to do; that is, to ascertain and determine from the *facts* the guilt or innocence of the accused, and establish the degree of his offense. The court cannot legally intermeddle with the facts in a jury case. The question of guilt or innocence is one of fact, and so as to the value of the property.

If it is error to instruct the jury as to the *grade* or *weight* of testimony, how much more strongly must this be the case when the court assumes to pass upon the whole facts of a case. Hoggsett v. The State, 40 Miss., 522.

If the court can reform the verdict in one respect, why not in another?

The law has erected impassable barriers between the courts and juries, and one cannot encroach upon the province of the other without producing fatal results. Having failed to correct the verdict in this case before the jury were discharged, the court could not alter or amend it afterwards.

Judgment and sentence reversed, cause remanded, and *venire de novo* awarded.

CAROTTI ET AL. v. STATE, 42 Miss. R., 334.

ADULTERY AND FORNICATION.

Criminal intercourse, once shown, is presumed, if the parties are still living under the same roof, to continue, notwithstanding those who dwell with them are not prepared to depose to the fact. The principle is specially applicable to a civil proceeding for a divorce.

In order to constitute the offense of adultery or fornication, under Art. 8, p. 573, of the Rev. Code, it must be shown that the parties dwell together openly and notoriously,

as if the conjugal relation existed between them. 13 Illinois, 597; 12 Iowa, 499; 8 Dev. & Batt., 110; 5 Blackford, 358; 10 Mass., 153.

C. and W. were indicted for unlawful cohabitation. The testimony showed that they lived together under the same roof as master and servant, and that there were occasional instances of illicit intercourse between them. *Held*—That under the statute the testimony was not sufficient to warrant a conviction.

Adultery and fornication are not indictable at common law unless committed openly and publicly, as in a street or highway.

Error to the circuit court of Marshall county. CLAYTON, J.

The opinion of the court contains a statement of the case.

Featherston, Harris & Watson, for plaintiffs in error.

Under the statute, Art. 8, Rev. Code, 573-4, the plaintiffs in error were tried and convicted. The phraseology of the act is too plain to admit of a doubt. The court below seemed to concur with us in this charge: "That occasional instances of sexual intercourse, even if the jury from the evidence believe that such did occur, are not sufficient to justify a verdict of condemnation. To warrant a conviction, the jury must believe from the evidence that the defendants did *live together* in unlawful cohabitation." This charge was clearly correct.

Unless there is *living* together, there is no offense under the law. Living together does not mean an association of a few minutes, however close and intimate.

A man and his wife are said to live together; but the expression has never been employed to denote the relations existing between a *roué* and his concubine, however frequent may have been their meetings, or however protracted and thrilling may have been their interviews. Unless they *lived* together, not for a few moments, or for a few hours only, but habitually, they could not possibly be embraced in the usual and legitimate meaning of the expression, "living together." The above statute embraces the two distinct offenses of *adultery* and *fornication*. The latter, at common law, was only a misdemeanor, but unless it partook of the nature of public and offensive lewdness, it was not in itself indictable. Whar. Am. Crim. Law, 760. Fornication and lewdness are almost convertible terms.

In the case of Brooks v. The State of Tennessee, 2 Yerg., 482, where a party was indicted for lewdness, not under any statute of the state, but under the common law, the court said: "The

offense must be open and notorious. If he did not commit the indecency alleged in *the public view*, he was guilty of no offense for which the public in its corporate capacity could punish him by indictment for a public nuisance."

Yet if the public be not involved, and the act, which might otherwise become criminal, is veiled in darkness or shrouded in secrecy, the law does not nor cannot undertake its punishment. Whether adultery is an offense in this country at common law, is a matter of doubt; in some of the states it is not. Anyhow, the terms of our statute have made it an offense, and so we must deal with it. We are now considering an alleged violation of the penal laws of our state, and have nothing to do with the relation and responsibilities of the marital kind.

The law gives redress to the father or the husband for any unholy infringement upon the purity and sanctity of the fireside. One single act of illicit intercourse on the part of either the husband or wife will, in a court of conscience, release the complaining party from the bonds and obligations of matrimony. So will a single act of illicit sexual intercourse with either the wife or daughter give to the husband or father a right of action for damages against the wrongdoer. But we deny that any case can be found, either at common law or under any statute analogous in its provisions to ours, in which any single act of illicit sexual intercourse has been criminally punished.

This statute is in its nature highly penal, and must therefore be construed strictly.

There must be a *living together* in adultery or fornication before it can be urged that there has been a violation of the statute? Why is adultery punishable at all? Simply because it is an invasion of social right, and the disturbance of the course of descent; and unless, therefore, the *living together*, in adultery or fornication, becomes a matter of such publicity and notoriety as to involve the well-being of the social compact, and be offensive to public morality, it is not an act of which the commonwealth can take cognizance, but remains to be redressed as a grievance against an individual or individuals. *Vide* Wright v. State, 5 Blackf., 358.

We are told that Solomon was a great lover of women, and

that he was a "mighty man among them," insomuch that he actually had "*seven hundred wives*, princesses, and *three hundred concubines*." It is impossible that he could have lived with them all, for they were scattered among the Moabites, Ammonites, Edomites, Zidonians, and Hittites; and while he ran counter to the divine will, and incurred the displeasure of High Heaven by the extraordinary indulgence of his lusts, he is nowhere condemned for having *lived* with ten hundred women.

So now a man may travel from town to town, from city to city, from country to country, tarrying a while in each, and selecting in each some frail and fair daughter of Eve for the occasional gratification of his sensual appetites; and even though in so doing he should rival the "glory and power of Solomon," yet unless it could be shown that there was habitual, public, and notorious *living together* in unlawful cohabitation, no punishment could be inflicted, either by the common law or by any statutory regulation of which we are aware.

The court erred in refusing the fourth charge, which is as follows: "That to justify a verdict of guilty, the jury must believe from the evidence that the defendant, Mary Wilson, yielded her person, generally or habitually, to her co-defendant, for the gratification of his passions, as between husband and wife." The charge is sound law. It simply suggests a standard by which the jury could have arrived at a satisfactory solution of the term "living together," as employed in the act, and is in *direct accordance* with the opinion of Judge Gaston in the case of The State v. Curren Jolly and Elizabeth Whitely, 3 Dev. & Batt. Law Rep., p. 115.

The most that can be said from the testimony in this case against the plaintiffs in error is, that it creates a suspicion; that they had, perhaps, in one or two instances, yielded to the flesh. The statements of the witness Ormesby are clearly entitled to no respect. He is shown to be not only extremely inimical to Carotti, but is directly contradicted by several witnesses of the highest credibility. The other and only witness who "saw those things which could not be seen," stultifies himself by declaring that "he attached no importance to an oath, &c., and would swear either way for a drink or a treat." We are only

called upon to answer the charge of "*living* together in unlawful cohabitation." This has not been proved.

If the legislature contemplated the punishment of one, two, three, or a dozen acts of illicit intercourse between the sexes, why was it that language was employed so broad and comprehensive as that contained in the statute?

It is to be presumed that there was some intelligence in the body by which that statute was passed; that they were all over twenty-one years of age, and were *possessed of some experience and observation* in the "*ways of the world.*" They knew it would be extremely difficult to find the man so pure as to be able "to cast the first stone." It may be, too, the members of that body, or some of them, had either read or heard of the Bible, and knew that our Saviour, when upon earth, knew that scarcely one could be found who was wholly guiltless; for when the "Scribes and Pharisees brought unto him a woman taken in adultery," and assured him that she was taken in the very act, after some reflection, he, being omniscient, as well as omnipotent, knowing all the human heart and human conduct, said to his tempters, "He that is without sin among you, let him first cast a stone at her." They all left, not one being able to pass the ordeal.

We know that all, not even excepting the most sanctimonious "Holy Willie" in the land, have need to say:

"But yet, O Lord, confess I must,
At times, I'm fash'd wi' fleshly lust;
And sometimes, too, wi' worldly trust,
Vile self gets in;
But Thou remembers we are dust,
Defiled in sin.

"Besides, I farther maun allow,
Wi' Lizzie's lass, three times I trow—
But, Lord, that Friday I was fou
When I came near her,
Or else, Thou kens, thy servant true
Wad ne'er hae steer'd her."

The second charge given by the court below, on the part of the state, was erroneous. It is neither in accordance with right reason, the results of human experience, or those occurrences in the future which the past gives us just cause to anticipate. Let it be remembered that the parties charged lived in a large and

popular hotel, open to the world; and that there were other female servants there, and that thousands of visitors annually frequented it. Among so many, Carotti might have had illicit intercourse with many or few, both white and black; and from this charge it is right to infer, that if he was culpable once, he was from that fact supposed to be necessarily guilty ever thereafter, so long as the "partner of his joys" remained under the same roof.

In an evil hour some fair one, who may be a regular boarder and inmate of the hotel, may yield her faith, and "eat the apple" so temptingly offered by a human serpent, as fully to overcome her frail powers of resistance; and yet from this charge she is forever precluded from the hope of reformation, and is compelled to find the road to repentance barred and blocked against her earnest efforts and entreaties.

C. C. Shackleford, for the state.

The court below was right in giving the second charge; the instruction is in the exact language of one of the greatest legal authors. 2 Greenleaf, § 43, p. 33; Turton v. Turton, Hagg. Eccl. Rep., 350.

The fourth charge for defendants was properly refused; it states no principle of law, but leaves the law to be determined by the jury.

The authority referred to to sustain the instruction, on examination, will be found inapplicable; and the term "husband and wife" is used only by way of illustration of a principle, and not as making a principle. State v. Jolly and Whitely, 3 Dev. & Battle.

The granting of a new trial rests in the sound discretion of the court below, as held by this court (Door v. Watson, 28 Miss., 383); and this court will not interpose unless there is a clear violation of right, and the truth and justice of the case. 1 S. & M., 381. It will not disturb the verdict, though found contrary to a portion of the evidence. 10 S. &. M., 313; 12 ib., 608; 14 ib., 624–7–8.

PEYTON, J.:

The record in this case shows that the plaintiffs in error were,

at the July special term of the circuit court of Marshall county, indicted for living together in unlawful cohabitation, from the 1st day of March to the 1st day of July, 1867, and that at the September term of the said court they were tried and convicted; that a motion was made to set aside the verdict and grant them a new trial, which was overruled by the court. To which ruling of the court the plaintiffs in error excepted, and the court then pronounced judgment upon them. And the cause comes here by writ of error.

The evidence on which the conviction was founded is substantially as follows:

Henry Ormesby, on the part of the state, testified that from the north window of the second story of his house, distant from Carotti's one hundred and twenty or thirty feet, he had seen, on several occasions, the defendants engaged in sexual intercourse, during the spring and summer of 1866; and that on Sunday, the 7th or 8th of April, 1867, witness, standing in front of his house, saw defendants, in an up-stairs room on the south side of Carotti's house, engaged in sexual intercourse; that the window was up, and witness saw the defendants thus engaged, but not so plainly as he had done on former occasions; that witness and Carotti were unfriendly, and had been so for some time. Witness kept a drinking-saloon in his house. The difference between witness and Carotti originated after the latter had opened a drinking-saloon in his hotel.

T. Dressler testified that some time in the fall of the year 1866, while working upon the said Carotti's house, he had occasion to go up-stairs in said house for some tools, where he discovered the defendants in the act of copulation.

George Chew testified that he was in the employment of defendant, Carotti, on one occasion, as a servant in his hotel, in the month of October, 1866, and about nine o'clock at night he went up-stairs to get a bed to make down for the barkeeper, and passed into said Carotti's room, where he discovered the defendants in bed together, without any light in the room.

Samuel Ellison testified that he was a servant in the hotel of said Carotti in October, 1866, and saw defendants lying, early one morning in that month, upon the same pallet in the

kitchen of said hotel, undressed and asleep, but saw nothing else.

Lewis McEwen testified that he was cook in said Carotti's hotel for several months, and had access to all parts of the house day and night, and never saw anything improper between the defendants.

S. Davidson testified that he saw defendants, one evening about dark, walking together in an alley in Holly Springs, and that he accosted said Carotti jocularly about it, when Carotti replied in the same spirit, and by implication admitted that he had criminal intercourse with his co-defendant, Mary.

John McGuirk testified, on the part of the defendants, that he was the lessee of the hotel, occupied by said Carotti, from the Miss. Cent. R. R. Co. His business called him a great deal about said hotel. Anonymous letters of a scurrilous character had been written to the authorities of said company about Carotti, which had been referred to him, as the general agent of said road, for investigation; that he had diligently investigated the charges of illicit intercourse between the defendants; had called said Carotti's attention to them, and Carotti told him that he would dismiss the said Mary from his employment, although she was a very superior servant, if he, witness, said so; and witness being fully satisfied that said charges were malicious, advised said Carotti not to dismiss said Mary, knowing her to be a very superior servant; that he had been at said hotel very often by day and by night, and had never seen any improper conduct between defendants; that he knew the locality of said hotel and witness Ormesby's house, and had taken position, with other gentlemen, in front of said Ormesby's house, with a view to ascertain if persons in the room of the hotel, where said Ormesby testified he had seen defendants in sexual intercourse, could be seen, and stated that it would be impossible; that from the height of the window-sills in said room, and an intervening brick wall left standing where the old hotel had been burnt, persons could not be seen from the front of said Ormesby's house in said room; that a person standing up in said room by the window might perhaps expose to view the head and breast from said Ormesby's house, but not the remainder of the person; that

it was 138 feet from the south side of said hotel, where said room was situated, to the north front of said Ormesby's house; that he had never been up-stairs in said Ormesby's house; that Carotti took possession of and opened said hotel on the 5th day of November, 1866.

H. E. Williams testified that he had made the same examination as the witness McGuirk, about the possibility of seeing persons in said room in said hotel from the front of said Ormesby's house, on the ground, and concurred with said McGuirk in his conclusion.

W. H. Jones testified that he was the city marshal, and had been to said Carotti's hotel repeatedly, at almost all hours, by day and by night, and that he never saw anything improper between defendants, and does not think that persons could be seen from the front of said Ormesby's house in said room of Carotti.

R. Hastings testified that he lived near the said Ormesby's house; that he never saw any impropriety between defendants; that he had a better view, from the front of his house, of said room of Carotti, than said Ormesby could have from the front of his; and that persons, either lying down or stooping in said room, could not be seen from the front of said Ormesby's house below, or of that of witness.

J. M. Spradly testified that he was a police officer of the city of Holly Springs, and had been at said Carotti's house very often, day and night, and never saw any impropriety between defendants, and knew from what he heard said Ormesby say, that he entertained very bad feelings towards said Carotti.

John Botts testified that he was at the hotel of the said Carotti, with his family, on Sunday, the 7th or 8th of April, 1867, and that he with his family occupied the said room in said hotel, and that his wife, being indisposed, was lying down in said room the whole of said day, he passing in and out of it during the day; that he had been a great deal at said hotel, and never saw anything wrong between said defendants, and that he could not see into said room from the front of said Ormesby's house below, owing to the height of the window-sill and the intervening wall.

Clarissa testified that she was in the employment of said Carotti at said hotel ever since Christmas, 1866, and had been through all parts of said hotel at nearly all hours, and never saw anything improper between said defendants. And Henry Harris testified to the same effect.

J. M. Yorrell testified, on the part of the state, that in March, 1867, about eleven o'clock at night, while waiting for the railroad train, he saw defendant, Mary, lying asleep in the dining-room of said hotel, with her head in said Carotti's lap, and lights burning in said dining-room. J. J. House thought persons might be seen in said room from the front of the said Ormesby's house, and John Dean thought that they could not, unless they were standing up.

The first error assigned is, that the court erred in giving the second charge on the part of the state, which is as follows: "Where criminal intercourse is once shown, it must be presumed, if the parties are still living under the same roof, that it still continues, notwithstanding those who dwell under the same roof are not prepared to depose to that fact."

This charge, as a general legal proposition, is correct, and is especially applicable in a civil proceeding for a divorce, where it became necessary to establish the fact of adultery. The court in such a case would certainly be authorized to draw the same conclusions which everybody else would draw from the same facts; and when it is once established that an occasional criminal intercourse has commenced between the parties, and they are found together under circumstances which would induce every unprejudiced mind to conclude their inclinations had not changed, the fair presumption would be that the same kind of intercourse still continued. But, even admitting the full force of this presumption in the case at bar, it would not establish the offense contemplated by the statute.

It is apparent from the testimony, that Carotti took possession of the hotel at Holly Springs, on the 5th of November, 1866, and opened the same on that day, and that Mary Wilson was employed by him as a domestic servant in said hotel, at the time that the offense charged in the indictment was alleged to have been committed by them.

Within the time the plaintiffs in error were charged in the indictment with living together in unlawful cohabitation, the testimony of Ormesby proves but one instance of sexual intercourse between them, and that was on the 7th or 8th day of April, 1867, in a room in the second story of Carotti's house, and stated to have been seen by the witness standing in front of his own house. And he is the only witness that testifies to this fact. Botts testifies that he and his family occupied that room of the hotel on that day, and that his wife, being indisposed, was lying down in said room during the whole of said day, and that he himself was passing in and out of it throughout the day, and saw nothing wrong between the plaintiffs in error. This testimony of Botts, and that of most of the other witnesses going to show that persons in that room could not be seen from the ground in front of said Ormesby's house, unless they were standing up, taken in connection with the fact that Ormesby entertained an unfriendly feeling towards Carotti, and with his own admission that he did not see them as plainly as he had on former occasions, furnish a good reason to doubt the correctness of his vision on that occasion. Be this, however, as it may, taking the whole testimony together, we cannot resist the conclusion that these parties have indulged, both before and since the opening of the hotel, in occasional sexual intercourse, but not under such circumstances as would make it indictable, either under the statute or at common law.

The second error assigned is, that the court erred in refusing to charge the jury, "that to justify a verdict of guilty, they must believe from the evidence that the defendant, Mary Wilson, yielded her person generally or habitually to her co-defendant, Carotti, for the gratification of his passions, as between husband and wife."

To determine the propriety of this charge, it becomes necessary to ascertain the meaning of that provision of the statute under which these parties have been prosecuted, which prohibits any man and woman from living together in unlawful cohabitation, whether the same be in adultery or fornication. Rev. Code, 573, art. 8.

We are of opinion that, in order to constitute this offense,

the parties must dwell together, openly and notoriously, upon terms as if the conjugal relation existed between them. It consists in the living together in the manner of husband and wife, without being lawfully married, in the open assumption of the visible forms and rights of matrimony, without the sanction of the nuptial tie, and without incurring those obligations and responsibilities which attach to the married state. The design of the statute was to prevent evil and indecent examples tending to corrupt the public morals, and to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which, as it contemns lawful wedlock and lessens the incentive to marriage, contravenes the public policy, and which outrages public decency, and has a demoralizing and debasing influence upon society. And where, indeed, they live together in the same family and under the same roof, in the relation of master and servant, and not as husband and wife, occasional clandestine sexual intercourse surely would not constitute the offense intended by the statute, of living together in unlawful cohabitation. Searls v. The People, 13 Illinois, 597; The State v. Marvin, 12 Iowa Rep., 499; The State v. Jolly, 3 Dev. & Batt., 110; Wright v. The State, 5 Blackford, 358; and The Commonwealth v. Calef, 10 Mass., 153. We therefore think the instruction was correct, and should have been given.

The third and last error assigned is that the court erred in refusing to set aside the verdict of the jury and grant a new trial.

It is very evident that the jury found their verdict upon a mistaken view of the law. They were, no doubt, under the impression that, as the plaintiffs in error lived together at the same hotel, although in the relation of master and servant, occasional instances of illicit intercourse, even though clandestine, would constitute the offense for which they were indicted, and they were probably aided in arriving at this conclusion by the refusal of the court to give the instruction asked on the part of the plaintiffs. The verdict was not justified by the evidence, and the court therefore erred in refusing to set it aside and grant a new trial.

Adultery and fornication, though in England cognizable criminally under the ecclesiastical law, were not indictable at common law, and are not therefore punishable in this country unless they are made so by statute. It is hence very competent for the legislature to prescribe not only the penalty for these offenses, but to limit the circumstances under which guilty parties may be prosecuted; and no presumption arises of an intention to render any person liable to a prosecution, except those who are clearly within the provisions of the statute.

In the absence of statutory provisions, the common law, as the guardian of the morals of the people, and their protection against offenses notoriously against public decency and good manners, will take cognizance of, and punish as misdemeanors, acts of adultery or fornication, when committed openly and publicly. An act of incontinency becomes an offense, punishable at common law, only when it is combined with circumstances which, beyond the mere criminality of the simple fact, were calculated to make it injurious to society, as in case of incontinency in a street or highway.

For these reasons the judgment is reversed, the verdict set aside, and the cause remanded.

DAWKINS *v.* STATE, 42 Miss. R., 681.

MALICIOUS MISCHIEF.

The remedy of "appeal" in the county court law is given from that court directly to the circuit court, and limited to that court; therefore no appeal or writ of error lies from a judgment of the county court to the High Court of Errors and Appeals.

Error to Jasper county court. CALHOUN, J.

Hardy & Acker, for plaintiff in error.

Jasper Myers, attorney general.

SHACKELFORD, C. J.:

The plaintiff in error was convicted upon an information in the county court of Jasper county, at the April term, 1869, thereof, charging him with malicious mischief in killing hogs,

the property of Enoch McCarty, and sentenced to pay a fine of $300 and imprisonment in the county jail for two months.

The case was tried by a jury, and verdict of guilty.

This writ of error is prosecuted to reverse the judgment rendered upon this verdict.

There are two questions presented for our consideration by this record.

1. Whether a writ of error will be allowed from the county court in such a case as the one under consideration.

2. If the writ of error cannot be taken from the county court to the circuit court in such a case, can a writ of error be taken directly to the High Court of Errors and Appeals?

1. It will be observed that the plaintiff in error did not waive his right to a jury, which he could have done under the provisions in § 14, p. 73, of the county court act, Pamphlet Acts, 1865; having been tried by a jury, the judgment on the verdict is final, from which no writ of error will lie to the circuit court.

In § 19 of same act, after pointing out the manner of "appeal," it is further provided that "no such appeal shall be had or granted from said county court when the same has been tried therein by a jury."

2. The county court being an inferior court, created by statute, with limited jurisdiction, we have to look to the statute creating it for the remedies provided in the same for redress from its judgments; the only provision for "appeal," using the language of the statute, from the judgment of the court, is to the circuit court. A writ of error or "appeal" to this court directly is not provided for anywhere in the act.

It is insisted, in behalf of the plaintiff in error, that a writ of error is a writ of right, and can be granted, and must be, from the judgments of the county courts, as well as from the circuit and chancery courts. Rev. Code, p. 22, and act amendatory thereof, p. 178, Pamphlet Acts, chap. 96, of 1858.

We are unable to concur with counsel in this view of the statute in question. It could be maintained with equal force that a writ of error could be prosecuted directly from the judgment of a justice of the peace to the High Court of Errors and Appeals as from the county court.

There was no county court in existence at the time of the adoption of the Code, or at the time of the passage of the act amending Arts. 306 and 307 of § 63 of the Code, making writs of error in criminal cases writs of right.

The remedy of "appeal" in the county court law is given from that court directly to the circuit court, and limited to that court.

The county courts not having jurisdiction of felonies, the legislature saw proper to limit all "appeals" to the circuit courts; and under the construction given to §§ 14 and 19 of the county court act by our predecessors, in the case of Liles v. Barnes, 40 Miss. R., p. 608, these "appeals," in criminal cases as well as civil cases at law, have to go into these courts by writs of error.

Whether we adhere to the construction placed upon §§ 14 and 19 of the act in question by our predecessors in the case of Liles v. Barnes, or depart from it, the decision of this case must be the same.

The act in question makes no provision for an "appeal" or writ of error (adopting the construction of the word "appeal" in this connection, given to it in Liles v. Barnes, to be a writ of error), when the case has been tried by a jury.

The plaintiff in error, by his own act, has placed himself in the position where he can neither get redress in this court nor in the circuit court. He is remediless, and the judgment against him in the circuit court is final, and the case has to be dismissed for want of jurisdiction.

We shall adhere to the construction placed upon §§ 14 and 19, in the case of Liles v. Barnes, 40 Miss., by our predecessors, for the reasons given by us in the opinion of the case of Hendricks v. Dyer, not yet reported; although we believe the intention of the legislature was to grant a trial *de novo* in all criminal cases under the provisions of § 19, when the party aggrieved waived a trial by jury.

Through the obscurity of the language used in § 19, it seems that, in the use of the word "appeal," as applied to criminal cases, the legislature meant a trial by a jury *de novo*, when no trial by jury had been submitted to by the party aggrieved. If this was not the intention of the legislature, why did they use

language in the conclusion of § 19, "that no such appeal shall be had or granted from said county court when the same has been tried therein by a jury"? It seems manifest, if they did not intend this, and that an "appeal" was meant to be a writ of error, why did they deny the right to a writ of error because the case had been tried by a jury? They seemed to have considered one trial by a jury sufficient.

Another reason, to be gathered from the language of this § 19, is that the legislature never intended that a writ of error was meant by the word "appeal," or that it should only lie from a trial by the court. If so, why did they use the language that this "appeal" should be granted to the next term of the circuit court, "without bill of exceptions, writ of error, or supersedeas," &c., "whereupon a transcript of the records and proceedings of such court shall be duly certified to said circuit court, *and said case shall be proceeded with in said circuit court as other cases therein*"?

It may be contended that the language used in the section just preceding the above quotation, warranted the construction placed upon it by our predecessors in Liles v. Barnes, that this "appeal" should be granted within five days after the adjournment of the term, as provided by law in other respects for *appeals in criminal* cases from the circuit to the High Court of Errors and Appeals of this state.

We think, from this language, that it was only intended to extend to the bond to be given by the party aggrieved by the judgment.

The only remedy provided by our statutes for the revision of a criminal case in the High Court of Errors and Appeals, is by writ of error. In this section it is provided that no bill of exceptions or writ of error is necessary for an "appeal."

How could the testimony get to the circuit court for it to try the case as an appellate court, unless it was carried to said court by bill of exceptions signed by the presiding judge who tried the case? This is dispensed with. The writ of error to bring up the record for the correction of errors in the record of proceedings below, not necessary to be embodied in a bill of exceptions, is also dispensed with.

Who is to certify "the transcript of the records and proceedings of such court"? The act does not say, but it seems evident that the clerk was meant as the party to certify. If he was meant, it certainly cannot be seriously contended that he should embody all the testimony taken in the case without bill of exceptions signed, and made part of the record, by the judge. It is not made his duty by the act to reduce the testimony to writing, and make it part of the record, to be embodied into the transcript to be sent to the circuit court.

If we are right in these views, how could a circuit court, as an appellate court, render a decision upon a record without bill of exceptions, without any of the testimony in the cause, or instructions refused or given which were excepted to? It would be absurd to think they could do so.

We do not intend, by anything said or intimated in this opinion, that we will disturb the previous rulings or construction placed upon the sections commented upon herein.

The law is radically defective in making no provision for "writs of error" (adopting the construction in Liles v. Barnes), when a party has been tried by a jury. We can give none by construction, which we are called upon to do by counsel.

Let the cause be dismissed for want of jurisdiction in this court.

WHITE v. STATE, 42 Miss. R., 635.

GRAND LARCENY.

Where a person has been indicted for an offense, and before conviction is pardoned, he is not liable for the costs of court and witnesses' fees.

Error to Tippah circuit court. CLAYTON, J.

Samuel White, the plaintiff in error, was indicted in the court below for grand larceny. At the September term, 1868, he appeared and pleaded a pardon, granted May 4th, 1868, in bar of the indictment. On this plea the judgment of the court was "that defendant be discharged, and go hence without day, and

that he pay the clerk, sheriff, and witnesses' costs, which have accrued in the case, and that execution issue therefor." To reverse this judgment a writ of error is prosecuted, and the error assigned here is that the court erred in rendering a judgment against plaintiff in error for court costs and witnesses' fees.

J. W. Thompson, for plaintiff in error.

In civil cases costs are not due until the final termination of the cause. Rev. Code, 150, art. 8. The law of costs shall not be interpreted as penal laws. The successful party shall recover costs, except in certain cases. There is no statute adjudging costs against an accused in cases like the one before the court. Rev. Code, 522, art. 255.

Plaintiff in error was pardoned before trial or conviction, even before plea, and relied alone on his plea of pardon. 1 Chitty Cr. Law, 382.

It is insisted that the officers of the court have a vested right to their fees, which cannot be affected by an executive pardon. In this state they have no such vested right until the final termination of the cause. Rev. Code, 150, art. 8.

Pardons are construed most favorable for the accused. 1 Chitty Cr. Law, 629, 632; 5 Coke, 49.

As to conclusiveness of a plea of pardon, see 2 Hale P. C., 391, 392; 1 Chitty Cr. Pl., 382; 3 Hawk. P. C., book 2, ch. 26, § 64.

Jasper Myers, attorney general,
Cited 4 Searg. & Rawle, 451.

SHACKELFORD, C. J.:

The plaintiff in error was indicted at the September term, 1866, of the Tippah circuit court, for robbery.

At the September term, 1868, of the said court, the plaintiff in error appeared, and was arraigned by the court, when he pleaded a pardon for the offense of which he stood charged in said indictment, and in bar of the same.

The pardon was under the great seal of the state, granted by B. G. Humphreys, governor of the state of Mississippi, dated on the 14th of May, 1868, and filed with the plea.

The language of the pardon is: "A full pardon for the crime wherewith he stands charged, and do authorize a dismissal of all proceedings against him on account thereof, and his discharge from custody."

The judgment of the court, after reciting the pardon, discharges the defendant, and orders "that he go hence without day," "and that the defendant pay the clerk, sheriff, and witnesses' costs, which have accrued in this case," etc.

This writ of error is prosecuted to reverse this judgment.

The only error complained of is the portion taxing the plaintiff in error with the costs of the case.

The court seemed to proceed upon the idea, either that the officers of court and the witnesses in the case had a vested right to the fees accrued in the case before the plea of pardon, or that by the production of the pardon it contained the evidence of his guilt, from the fact of his refusal to be tried under the indictment, and procurement of the pardon; and that for these reasons he should be taxed with the costs up to the time of the filing of his plea.

There could be no question as to the liability of the plaintiff in error for the costs if he had been convicted by a jury, and he had pleaded it in bar of the execution of the sentence.

It seems to us that the discharge by the court of plaintiff in error, after the hearing of his plea in bar, was equivalent to an acquittal by jury.

The position that the officers of the court have a vested right or lien for their costs as fast as they may accrue in a case, we do not think tenable. This could only be when one party or the other is bound for the costs, without any conditions of liability at the commencement of the suit, and which could not be avoided by any result in the case.

In the case before us, under the practice in our circuit courts, the question of liability for costs had to await the determination of the case, they having adopted the rule laid down in our Code, p. 150, art. 8, regulating the practice in civil suits, where it is held that costs accruing upon suits in any of the courts of this state shall not be due until the final determination of said suits,

and then shall be adjudged to the successful party, and collected by execution out of the party losing the case.

In the case before us, the plaintiff in error did not lose his case; if he had committed the offense charged in the indictment, he had a pardon for it; his plea in bar was sustained by the court, by which the state was defeated. A discharge under this plea of pardon did not place the question of liability for costs in a different attitude than a discharge under any other plea in bar to the indictment would have placed him.

There being no statute in this state prescribing any rule in criminal cases for the taxation of costs, the circuit courts had necessarily to adopt the same rule in criminal cases as established in civil cases. Under Art. 8, p. 150, of the Rev. Code, the reasons for the adoption or enactment of Art. 8, referred to, necessitated the adoption of a similar rule in the adjudication of costs in state cases.

The decision in the case before us is a departure from the rule universally adopted by the circuit courts, and acted upon by them in state cases in this state, and in most of the states of the Union.

The reasons for the ruling of the judge who tried the case at bar, ordering the plaintiff in error to pay the costs in the case, we can only conjecture.

Under any view of the case taken by the judge below, we think he misapprehended the law, and the judgment should be reversed, and that the proper judgment should be entered in this court, releasing the plaintiff in error from all liability for the costs adjudged against him in the court below.

WILSON *v.* STATE, 42 Miss. R., 639.

PASSING COUNTERFEIT MONEY.

In criminal cases the defendant cannot waive an arraignment, and he must plead in person to the indictment; he cannot plead by attorney; and where it is shown that the "defendant appeared by attorney and pleaded not guilty," the judgment will be arrested and the verdict set aside.

Error to Warren criminal court. McGARR, J.

On the 1st of March, 1867, plaintiff in error was indicted for passing counterfeit money. An *instanter capias* was issued, plaintiff in error arrested, and released on recognizance. At the November term, 1867, of the court below, plaintiff in error appeared in open court, waived a formal arraignment by his attorney, and pleaded "not guilty" as charged in the bill of indictment. At the November term, 1868 (there having been two mistrials previously), the plaintiff in error was tried and convicted. A motion in arrest of judgment was made for the following reasons: First, because plaintiff in error was never arraigned, and could not, in person or by attorney, waive the same; second, because plaintiff in error never pleaded to the indictment, the one filed by his attorney being a nullity. The motion was overruled, a bill of exceptions signed, and the plaintiff in error sentenced to five years' imprisonment in the penitentiary. From which judgment the plaintiff sued out this writ of error.

Miller & Birchett, for plaintiff in error.

Arraignment of the prisoner is necessary. The record does not show that the prisoner ever was arraigned. It does show that *by attorney* arraignment was waived, which cannot be done where the party is charged with a felony. 2 Hale, 216; Roscoe Cr. Ev., 181; 1 Chitty Cr. Law, 414.

The record shows that the prisoner "appeared in court, according to the tenor of his recognizance;" but, although in court, a trial without arraignment is virtually the trial of a party during his absence, which cannot be done. 1 Chitty Cr. Law, 414, 421.

In arraignment, the court should not dispense with the prisoner standing at the bar, particularly in cases of felony. Chitty Cr. Prac., 108.

Want or omission of arraignment is sufficient ground for reversing the judgment. 1 Chitty Cr. Law, 418.

Defendant never pleaded to the indictment. Plea *by attorney*, when the prisoner is charged with a felony, is a nullity. The defendant must plead in his own proper person. McQuil-

len v. State, 8 S. & M., 295; 1 Chitty Cr. Law, 436, 472; Bishop Cr. Procedure, 684, note.

At terms of the court subsequent to the one at which defendant *waived* arraignment and pleaded by attorney, the record shows that "the defendant at a former term waived arraignment and pleaded not guilty;" which was not the fact, and which the record itself contradicts. It is incompetent for the clerk at a subsequent term to make any entry of what had transpired at the preceding terms. McQuillen v. State, 8 S. & M., 295.

Arrest of judgment operates to discharge the prisoner.

Jasper Myers, attorney general,
Cited Price v. State, 36 Miss., 542.

JEFFORDS, J.:

The following are the assignments of error:

1. The court erred in overruling the motion of the plaintiff in error in arrest of judgment against him, there being no legal arraignment and plea.

2. The court erred in going to trial without a legal arraignment and plea by plaintiff in error.

3. The court erred in not setting aside the judgment for want of a legal plea.

The recital in the record shows that "this day came the district attorney, for and on behalf of the state, and the defendant appeared here in court, according to the tenor of his recognizance; and by his attorney waiving a formal arraignment of the premises, pleads not guilty as charged in the indictment," &c.

Our code provides "that if the *defendant*, on arraignment, *refuses* or *neglects* to plead, or *stands mute*, the *court must* cause the plea of 'not guilty' to be entered, and proceed to trial." Rev. Code, p. 620, art. 293.

The simple question is raised by this record whether a person charged with the commission of a *felony* can *waive* his *arraignment* and *plead by attorney*. The defendant cannot waive his arraignment, nor can he plead by attorney. The plea by attorney is no plea. Bishop on Criminal Procedure, § 684; McQuillen v. The State, 8 S. & M., 595; Chitty's C. L., 418; Douglas

v. The State, 3 Wisconsin, 820. Where the crime charged reaches the grade of *felony*, the authorities are clear that the accused must be arraigned and plead in *person*, unless he *stands mute*, or *refuses* or *neglects* to plead, in which event the "*court* must cause the plea of 'not guilty' to be entered, and proceed with the trial."

It does not appear from the record that the defendant *stood mute*, refused, or *neglected* to *plead*. The record not only fails to show that the defendant was arraigned, but it appears *affirmatively* that the defendant was not arraigned; that his arraignment was *waived*, not by himself, but by his *attorney*. What the defendant could not do in his own proper person, certainly could not be done by his attorney. We are of opinion, therefore, that the judgment and sentence of the court below should be reversed, the cause remanded, and a new trial awarded.

UNGER *v.* STATE, 42 Miss. R., 642.

LARCENY.

Where the owner of the goods cannot be ascertained, the indictment laying them to be the property of some person unknown will be valid. But if the owner is known, such an allegation will be improper; and, on the discovery of his name on the trial, the prisoner will be acquitted. 3 Chitty Cr. Law, 949. Wherever the name of the party is known, it is absolutely necessary to insert it in the indictment, and the entire Christian name as well as the surname of the party must also be inserted.

To sustain an indictment for larceny, it must be proved that the goods alleged to be stolen are the absolute or special property of the person named as owner in the indictment, and that the offense has been committed. State v. Furlong, 19 Me., 225.

The right and power to amend an indictment for a felony in a material matter, after the expiration of the term of court at which it is found, and without the consent of the accused, is questionable.

In rendering a verdict of guilty in any case of simple larceny, the jury should always find the value of the property stolen, or the court cannot legally pronounce judgment.

In prosecutions for larceny, where the goods have been proven to have been stolen and in the possession of the accused soon afterwards, the fact of possession raises a reasonable presumption of his guilt.

Error to Claiborne circuit court. SMILEY, J.

Elias Unger, the plaintiff in error, was indicted in the circuit court of Claiborne county, on the 21st of October, 1865, for the larceny of two bales of cotton, the property of D. W. Hum-

phreys. At the December term, 1867, during the trial the indictment was amended, changing D. W. Humphreys into D. G. Humphreys. The jury returned a verdict of guilty, and upon the prisoner's motion for a new trial being overruled, he excepted and sued out this writ of error.

J. B. Coleman, for plaintiff in error.

1. That the change in the indictment made by the court, or by its permission, was utterly unauthorized and erroneous, we cannot for a moment permit ourselves to doubt. Its effect was to try the defendant for an offense, and upon an indictment not found by a grand jury.

"It is necessary that there should be *some person* in whom is a sufficient ownership of the things stolen; and that they should be stated in the indictment as the goods and chattels of such person." 2 Russell on Crimes, marg. p. 154.

"It is well settled that larceny may be committed by stealing goods, *the owner of which is unknown;*" but "It should be well observed, however, with respect to prosecutions for stealing goods of a person unknown, that an indictment, alleging the goods to be the property of a person unknown, will be improper if the owner be really known; and that in such case the prisoner must be discharged of the indictment so framed, and tried upon a new one for stealing the goods of the owner by name." 2 Russ. on Cr., marg. p. 162.

If, then, it is essential to the validity of an indictment for larceny, it should state the name of the real owner of the property stolen; and if, upon an indictment alleging the stolen property to be owned by some person unknown, when in fact the owner was known, the prisoner must be discharged, and a new indictment found against him. How much stronger, upon principle, is his right to a discharge when the indictment alleges the goods stolen to be the property of W., and they are proven on the trial to be the property of G.

The reason of this rule is obvious. To constitute a felonious taking and carrying away of goods, it is essential that it should be against the consent of the owner (*invito domino*). Hence, where the name of the owner is known, it is essential that it

should be stated in the indictment, as well to enable the state to make out its case by proving that the goods were taken without the assent of the owner, as to give the prisoner an opportunity of defending himself, by showing the assent, express or implied, of the owner.

It is very clear that, at common law, the defendant would at once be entitled to a discharge from the indictment.

But it is contended that the rule of the common law upon this point has been abrogated by our statute, Rev. Code, 615, art. 262, § 57. This article provides that whenever, on the trial of an indictment, there shall appear to be any variance between the statements in such indictment and the evidence, "in the Christian or surname, or both, or other description whatever, of any person whomsoever therein named or described, or in the ownership of any property named or described therein," it shall be lawful for the court, "if it shall consider such variance not material to the merits of the case," to order such indictment to be amended according to the proof, &c.

Did this article stand alone, uncontrolled and unexplained by any other part of the statute, we should still say that the alteration made by the court in this indictment, without the consent of the grand jury which found it, and against the protest of the defendant, was wholly unauthorized by the statute itself, for the reason that the power given to the court to amend an indictment is expressly limited to cases in which "the variance is not material to the merits of the case;" and we have shown, by our citations from Russell, that in an indictment for larceny the name of the owner of property alleged to have been stolen is, in the highest degree, material—material to the state, and most essentially material to the merits of the case. McGuire v. State, 35 Miss., 367.

2. The motion for a new trial should have been sustained. The testimony was not sufficient to authorize the jury to find a verdict of guilty.

3. That the pretense that the accused was an accessory before the fact is entirely unsustained by the testimony. There is no evidence that plaintiff in error counselled, commanded, or procured the crime to be done.

C. C. Shackleford, for the state, contended—

1. That the amendment to the indictment was properly made, and was immaterial in its character, and fully authorized by the statute. Rev. Code, 615, art. 262; ib., 614, art. 257; and that the right and power to amend is not limited to the term of the court is that the indictment is found.

He commented on the testimony, and insisted that it fully sustained the verdict of the jury.

PEYTON, J.:

At the March term, 1866, of the circuit court of Claiborne county, the plaintiff in error was indicted for the larceny, on the 21st day of October, A. D. 1865, of two bales of cotton, the property of D. W. Humphreys, and was tried at the December term, A. D. 1867. The jury returned a verdict of guilty. The plaintiff in error moved the court for a new trial, on the following grounds:

1. Because the court allowed the district attorney, after the jury had been elected and sworn, and after the examination of witnesses for the state had been commenced, to change the name of the owner of the cotton alleged to have been stolen from D. W. Humphreys, as charged in the indictment, to D. G. Humphreys, without the consent and against the protest of the prisoner, and without the consent of the grand jury who found the indictment.

2. Because the verdict of the jury was against the instructions of the court, and unsupported by the evidence.

3. Because the court erred in giving the instruction asked for by the state.

4. Because, in his opening argument, the district attorney never made or alluded to any liability on the part of the prisoner *as accessory before the fact*, but presented it for the first time in his closing argument, and argued the facts to sustain it before the jury, to which the counsel for the prisoner had no opportunity to reply.

5. And because the verdict of the jury was evidently the result of a strong prejudice on the part of a portion of them against the defendant and one of his witnesses.

This motion was overruled by the court, to which the defendant below excepted; and the defendant was thereupon sentenced by the court to confinement in the penitentiary of the state for the term of three years. The plaintiff in error brings the cause into this court, and makes the following assignment of errors:

1. The said circuit court erred in permitting the district attorney to amend and alter the indictment in a material particular, twenty-one months after said indictment had been found, without the consent of the grand jury who found it, and against the protest of the plaintiff in error.

2. The said circuit court erred in overruling the motion of the plaintiff in error for a new trial.

The first assignment of error presents two questions for our consideration: 1. Whether the indictment, as found and returned by the grand jury, was sufficient; and 2. If not, whether it could be legally amended in matter of substance after the term of the court had expired at which it was found, without the consent of the defendant.

To protect the innocent and punish the guilty are the two great objects to be kept in view in the administration of criminal jurisprudence. While, upon the one hand, the law will hold the offender to a strict accountability, it should, upon the other, extend to the accused all possible facilities for a fair, full, and impartial trial. And as the accused is always presumed innocent until convicted, no course should be adopted that would deprive him of that fair trial so humanely secured to him by the law.

Simple larceny is defined to be the felonious taking and carrying away the personal property of another. Where the owner of the goods cannot be ascertained, the indictment laying them to be the property of some person unknown will be valid. But if the owner is known, such an allegation will be improper, and on the discovery of his name on the trial, the prisoner will be acquitted. 3 Chitty's C. L., 949.

Hawkins lays it down that it is more important to have the correct Christian name than the surname of the defendant in the indictment. 2 P. C., 317. But the modern decisions make no

distinctions between a misnomer of the surname and Christian name. In either case, if it be a substantial variance from the true name, it is good cause for abatement of the proceedings. Lynes v. The State, 5 Porter, 241. And whenever the name of the party injured is known, it is absolutely *necessary* to insert it. Thus, in an indictment for larceny, though the goods may be laid to be the property of *persons unknown*, if that is actually the case, yet, if the owner be really known, the allegation will be improper, and the prisoner must be discharged from that indictment, and tried upon a new one, rectifying the mistake. 1 Chitty's C. L., 213.

To sustain an indictment for larceny, proof must be adduced that the goods alleged to be stolen are the absolute or special property of the person named as owner in the indictment, and that the offense has been committed. The State v. Furlong, 19 Maine, 225.

We think it essential to the legal sufficiency of an indictment for larceny, that the entire Christian name, as well as the surname of the owner of the goods alleged to be stolen, should, if known, be set forth in the indictment.

The indictment, as found and returned into court by the grand jury, charges the plaintiff in error with the larceny of two bales of cotton, the property of D. W. Humphreys, and which was afterwards amended to D. G. Humphreys; and upon the trial it appeared from the testimony that the cotton alleged to be stolen was the property of David George Humphreys. This was a fatal defect in the indictment, which might have been taken advantage of before verdict. David George was the owner's Christian name, and it needs no argument to prove that D. W. or D. G. and David George are different names. This defect in the indictment is, however, cured after verdict by the statute of jeofails. Rev. Code, 573, art. 7.

In the present attitude of this case, we deem it unnecessary to decide the second question raised by the first assignment of error, as to the legal right and power to amend an indictment for felony in a matter material, after the expiration of the term of the court at which it was found, without the consent of the accused; yet, without giving any definite opinion upon the

subject, we are inclined to think it would be a doubtful exercise of power.

There appears, from the record, to have been no evidence given to the jury of the value of the property alleged to have been stolen. In rendering a verdict of guilty, in any kind of simple larceny, the jury should always find the value of the property stolen, that the court may know what sentence they ought to pronounce, or it will be like a verdict in a civil action, where the jury find for the plaintiff, but neglect to give damages. 3 Chitty's C. L., 928; 5 East P. C., 741.

Grand larceny, under our law, is the stealing of the personal property of another, above the value of twenty-five dollars, and is punishable as a felony in the penitentiary of the state.

Petit larceny is the stealing of the personal property of another, of the value of twenty-five dollars or under, and is a misdemeanor punishable by fine and imprisonment in the county jail.

Hence, it is apparent that the verdict should fix the value of the property stolen, so that the court may know with certainty of which offense the defendant has been convicted; otherwise the court cannot pass sentence upon the prisoner.

In this case, the verdict is a general one of guilty, without finding the value of the property stolen, or specifying whether the offense is grand or petit larceny. Nothing can be taken by implication in a criminal case. The clear and absolute ascertainment of facts alone warrants the character of the punishment pronounced by a court of justice. No possible doubt should be entertained whether the verdict of the jury warrants the judgment to be given. Where inference and intendment are to be resorted to, to supply the defect in the verdict, as to the value of the property stolen, as in the present case, doubts cannot but arise as to the correctness of such inference and intendment of the law.

It is one of the boasted principles by which the character of our criminal jurisprudence is said to be marked, that in all cases of doubt the criminal shall be entitled to the benefit of it; and it is not more wise than it is humane.

In prosecutions for larceny, where the goods are proved to

have been stolen, it is an admitted rule of law, applicable in these cases, that possession by the accused soon after they were stolen, raises a reasonable presumption of his guilt. Such evidence is sufficient to make out a *prima facie* case on the part of the state, proper to be left to the jury, and, without opposing testimony, would generally be sufficient to sustain a verdict of guilty. But in this case, the strength of that presumption is much weakened, if not entirely destroyed, by the testimony of John C. Humphreys, a witness on the part of the state, who testified that, soon after the cotton was taken, he noticed tracks of feet in his pasture where the cotton was put into the wagon, and that they were apparently such as would be made by negro brogans; and these were the only tracks to which he testifies. This raises a strong presumption that the cotton was stolen by negroes in the absence of the accused; and there being no evidence in the record that he procured, counseled, or commanded them to take it, he could not, upon the evidence, be properly convicted, either as principal in the larceny, or as accessory before the fact.

For these reasons, we think the court erred in overruling the motion for a new trial.

The judgment will, therefore, be reversed, the verdict set aside, and the cause remanded for a new trial.

STREET v. STATE, 43 Miss. R., 1.

HOMICIDE.

At common law, the court of king's bench and its judges had the *power* to bail in all felonies, before or after conviction, without regard to the nature of the crime or punishment. But the practice was not to bail where the facts made it highly probable that the accused had committed a felony.

The discretionary power to bail, at common law, was rarely exerted after indictment for a felony, except in special circumstances, arising generally after indictment.[1]

The bill of rights makes bail a matter of *right* for all crimes except capital felonies, where the presumption is great or proof evident. The original of this provision is a clause in the ordinance of 1789, for the government of the territory north of the Ohio

[1] 2 Coke's Inst., 186, *et seq.*; 2 Hale's P. C., 129; 1 Chitty's Cr. Law, 128.

river. From this original it has been copied into most of the state constitutions and statutes.[1]

The courts of many of the states hold the indictment for murder as furnishing the "presumption great," and decline to hear testimony to reduce the grade of the crime from murder to manslaughter.[2]

In this state for many years the practice varied. But since the decision in the case of the State v. Wray, the practice has been to receive testimony *aliunde* the indictment.

On a writ of error in *habeas corpus* proceedings, the supreme court exercises purely a revisory and correctionary jurisdiction. The judgment reviewed is presumptively correct, and error must be shown. The supreme court have no larger discretionary power to bail than the court of original jurisdiction.

If the testimony be conflicting, or the credibility of witnesses involved, the appellate court would regard the circuit judge who heard it orally as in the most favorable condition to come to a correct conclusion, and would not disturb his decision.

If the testimony make the impression on the mind of the supreme court that the petit jury would be warranted in a verdict of guilty, the judgment of the circuit judge denying bail would be affirmed.[3]

If the return to this writ is that the relator is in custody, to answer an indictment for murder, lawful authority for the detention is shown;[4] and if no testimony were offered to show a lesser grade of felonious homicide, or that the accused ought not to be convicted of any offense, it would be the duty of the judge to remand.

It is well-settled law that before the acts and declarations of one party can be received in evidence against another, in a criminal prosecution, there must be proof of a conspiracy, *aliunde*. The words themselves do not prove the conspiracy, or tend to prove it; and, therefore, such declarations are mere hearsay. But it is quite as well settled by authority that a "conspiracy may be proved, like other controverted facts, by the acts of parties, or by circumstances, as well as their agreement."

Error to the circuit court of Yazoo county. CUNNINGHAM, J.

Upon application of Street, by *habeas corpus*, to be discharged from custody or admitted to bail, he being confined in jail upon indictment found at January special term, 1870, of Yazoo circuit court, for murder.

In the first count of the indictment, Street and David Roach were indicted as principals; by the second count Street was charged as accessory before the fact; and by the third, as accessory after the fact, of the murder of Benjamin Roach, brother of said David.

Of David's guilt, the evidence admitted of no doubt or dispute, except that possibly his weak and dissolute understanding rendered his legal accountability questionable. But of *Street's*

[1] Const. U. S.

[2] Const. Miss., art. 1, § 17.

[3] Shore and Parkinson's case, 6 Mo., 640; Foley v. People, 1 Breese (Ills.), 33; *ex parte* Campbell, 20 Ala., 80; *ex parte* McCrary, 22 ib., 65; R. M. Charton's R., 120; Antonez v. State, 26 Ala., 81.

[4] *Ex parte* White, 4 Eng., 222; People v. Lohman, 2 Barb., 450; People v. McLeod, 1 Hill, 377.

connection with the affair, there was much conflict in the statements of witnesses.

On the part of the state, he was represented by some of the witnesses as having previously quarrelled with deceased, and threatened to have his revenge; as having given David Roach excessive quantities of whisky on the morning of, and immediately before the killing; as sitting, at the time of the murder, quietly in the yard with others, his friends and associates, some of them his relatives, about forty steps from the house where the murder occurred, in full hearing of the pistol-shot, and of the cries for help, and in full view of the attempt made by one of the witnesses (McDowell) to arrest David Roach; and that Street and his associates kept their seats, with the utmost unconcern, till David Roach, finding himself unable, alone, to resist the arrest, exclaimed to Street, "if you do not come and assist and befriend me, as you promised, I will tell who gave me the pistol," or words to like effect. That thereupon Street came instantly to his assistance, told the witness, who was trying to arrest him, that he had no right to do so without a warrant—that he (Street) wanted to talk to David—that David must take care of himself, and he (Street) did promise to befriend him, &c.; that thereupon Street led David away to his (Street's) horse, which was standing saddled in the yard, mounted him on the horse, and David rode rapidly away; and that the pistol used by David was the property of Street. These facts were sworn to by a white man named McDowell, and sworn to, or corroborated, by several colored persons on the premises.

Street's witnesses were chiefly the persons alleged as above to have been seated with him in the yard, and others of his relations and associates—by whom all the facts and circumstances inculpating him were positively denied. Those present on the premises denied that they had heard the report of the pistol, or any cry of murder, or call for help. They denied that the pistol belonged to Street, but said it belonged to one of Street's witnesses. They denied that Street gave his horse to David, but stated that he took the horse by force, threatening to kill any of them who should attempt to prevent or oppose him.

They stated that Street and the deceased were, and had always been, entirely friendly. Street also proved that David was a person of weak and infirm mind, and that he had frequently, within ten years before, threatened to kill his brother, the deceased.

Such was the substance of the evidence, as brought up in the record.

Hudson and *Nye*, for plaintiff in error,

Insisted that the judge below erred in refusing bail in this case. The relator stands indicted in the circuit court of Yazoo county as accessory *before* and *after* the fact of the murder of Benjamin Roach by David Roach, and the question presented is simply one of bail for Street.

If he was accessory *after* the fact, he is, by law and of right, entitled to bail. Rev. Code, 573, art. 3. This statute settles the question; for, whether guilty or not, as accessory *after* the fact, he is clearly entitled to bail.

There remains but a single other question to settle, and that is, whether he was accessory *before the fact*, by "proof evident or presumption great," in the meaning of the constitution as defined by law. See Art. 1, sec. 8, of the Constitution of 1869. And if "the proof is not evident, or the presumption great" that he was accessory *before the fact*, then he is entitled to bail; and that bail must not be excessive; in other words, "must not be unreasonable," as secured by the same provisions of the constitution.

Bail is a matter of right in all cases, even capital, except when the "proof is evident or the presumption great," and forms an exception to the rule, even in capital cases.

It can only be known whether the proof is evident or the presumption is great, of his being an accessory *before the fact* of the homicide of Roach, by hearing the testimony in the case on the part of the state. And yet, in this case the state declined and refused to produce any testimony against the defendant below. In the absence of all testimony on the part of the state, it was the duty of the court below to discharge the defendant. But he was denied bail, denied his discharge, and remanded to prison. The *onus* of proving everything essential

to the establishment of guilt lies on the state. Starkie on Ev., 436; 11 Pick., 125–132; Wills on Circum. Ev., 183; Wharton's Am. Cr. Law, 347; 4 Blackstone, 552; Wright's R., 617; 5 Blackf., 579; 1 Jones Pa. Rep., 369; 4 Barr, 270; 3 Gillman, 644; Wharton's Am. Cr. Law, 327.

Is the "proof evident or the presumption great" that Street was an accessory *before the fact?* This proof is not mere evidence, with which it is sometimes confounded. Evidence is not proof, but the medium of proof, while proof is the effect of evidence. 3 Black. Com., 367; 1 Greenl. Ev., § 1; Wills on Circ. Ev., 2; Burr. on Circ. Ev., 1. "Proof is the perfection of evidence," says an English writer. Best on Presumptions, § 6; Burr. on Circ. Ev., 182. "Proof," derived from the Latin word *probatio*, is used as a word to designate direct evidence in contradistinction to *presumptio*, *argumentum*, &c. J. Voet ad Paul, lib. 22, title 3, note 15. Best on Presumptions, § 4, note. Evidence is that which *makes clear*, or evident, the the truth of an alleged fact, or which demonstrates, makes clear or ascertains the truth of a fact or point in issue. 3 Black. Com., 367, and when it rises so high in its power of conviction as to establish the fact in issue beyond every reasonable doubt, then it amounts to proof, and not before. 1 Benth. Jud. Ev., 41; 1 Greenl. Ev., § 13; Burrill on Circ. Ev., 4. "Presumption great," Burrill on Circ. Ev., 10.

The term "presumption," as employed in *law*, means the arriving at the truth of a disputed fact. It is the essential principle of circumstantial evidence, and known as *judicial presumption*. Burrill on Cir. Ev., 41; 3 Bl. Com., 371; 3 Phil. Ev. (Cow. & Hill's notes), note, 286; Burrill on Cir. Ev., 60, 61, 62, 63, 64, 65. It must establish the fact beyond every reasonable doubt. Best on Presumptions, § 30; 3 Benth. Jud. Ev., 236, 237. "Presumption great" means the same force as "proof evident" does before bail can be denied.

2. The existence of a conspiracy must be proven by competent testimony. The admissions of one conspirator is incompetent as against others; the criminal combination must be proven by *evidence aliunde* (30 Miss., 656; 36 Miss., 617), before such admissions or confessions can be admitted. 1 Greenl.

Ev., § 111; 2 Starkie Ev., 327; Wharton Am. Crim. Law, 261, 262; 30 Miss., 656; 36 Miss., 617. Such acts and declarations must have been *made during the criminal enterprise* and *pending*, and *before its completion or abandonment*, or they are not a part of the *res gestæ*, and cannot be admitted as evidence. 1 Phil. Ev., 200; 1 Greenl. Ev., § 111–280–233; Roscoe Crim. Ev., 80; 2 Starkie Ev., 326; Wharton Am. Crim. Law, 161, 162; 30 Miss., 656; 36 Miss., 617; Roscoe Crim. Ev., 49, 50–77; 1 Hawk. R., 442; 10 Pick., 447–497; 1 Dev., 259; 4 Car. & Payne, 387; 4 ib., 570; 2 Phil. Ev. (Cow. & Hill's notes), 238.

By the Constitution, Art. I, § 8, the policy and the law that must guide courts in determining the right of bail is fully announced. The accused, in all cases not capital, shall have bail, and in cases capital they shall also have bail, except where the "proof is evident or the presumption great;" and even in such cases, they shall have bail if a doubt of guilt arises. J. R. Wray, *ex parte*, 30 Miss., 673. Bail may be granted before conviction, even where the proof is evident and the presumption great. 30 Miss., 673. If there is reason to doubt that the accused conspired with David Roach, or if there is a reasonable doubt whether the homicide was murder, then bail ought to be granted. 3 Greenl. Ev., § 29, Wray, *ex parte*, 30 Miss., 673; 1 Starkie Ev., 478; 1 Hale P. C., 300; 6 Georgia, 276; and see, especially, opinion of Ch. J. in Dr. Webster's case, 5 Cushing, 320, as to question of "proof evident," "presumption great," or "reasonable doubt." Moore v. State, 36 Miss., 137; Beall v. State, 30 Miss., 715; Wray, *ex parte*, 30 Miss., 673.

The action of the United States courts on this subject is in harmony with the state courts, as is shown by the admitting of Jefferson Davis to bail.

No matter how strong or violent the probabilities raised by the evidence against the accused may be, yet if they do not rise to the degree of "proof evident" of his guilt, he is entitled to bail, and if he were upon trial before a jury, would be entitled to an acquittal. Commonwealth v. Webster, 5 Cushing, 320; Browning v. State, 30 Miss., 656; Algheri v. State, 25 Miss., 584. As to the application of circumstantial evidence, see 25

Miss., 584; 3 Greenl. Ev., 31; 1 Starkie Ev., 572; 5 Cushing, 320–296–313–317–319; 5 Blackf., 579; 2 Hale, P. C., 290.

To prove the accused an accessory *before the fact*, it should be shown that he instigated and incited the principal to commit the crime. 3 Greenl. Ev., § 50; also, Rex v. Cruise, 8 Car. & Payne, 541; Whar. Am. Cr. Law, 114; Rex v. White, Russ. & Ry. C. C., 99; Rex v. Mayer, 1 Leach, 314; 1 Hale, P. C., 439; Foster P. C., 350; Whar. Am. Cr. Law, 113; Rex v. Davis, Russ. & Ry. C. C., 113; Rex v. Else, Russ. & Ry. C. C., 142; Hales' Sum., 216; 2 Hawk. P. C., 28, § 10. See, also, 30 Miss., 673.

After the fatal blow was given by David Roach, all that was said or done by him, or by the accused, ceases to have any bearing against the latter as accessory *before the fact*, or on the question of his right to bail. 1 Phil. Ev., 200; 1 Greenl., §§ 111–233–280; Roscoe's Cr. Ev., 49, 50–77–80; 2 Starkie Ev., 326; Whart. Am. Cr. Law, 161, 162; 1 Hawk. R., 442; 11 Pick., 447–497; 1 Dev., 259; 4 Car. & Payne, 387; 4 ib., 570; 2 Phil. Ev. (Cow. & Hill's notes), 238; 30 Miss., 656; 36 Miss., 617. See also, 1 Greenl. Ev., § 197; ib., 200; 17 Mass. R., 27; 3 Esp., 60; 3 Sumner, 435–438, 439; 11 Verm. R., 138.

Lastly, the accused had no motive, interest, or advantage in the death of the deceased, or in the escape, life, liberty, or concerns of David Roach. 11 Wheaton R., 51; 4 Bl. Com., 160; 5 Yerger R., 459; Inst. Nat. Law Book, 1 C., 16.

Wilkinson & Bowman, on the same side.

The plaintiff is charged as accessory before the fact, and as principal with David Roach, in the murder of his brother, Benjamin Roach. By the paramount law of the land, he is entitled to bail, unless the proof is evident, or the presumption great. Constitution, Art. I, § 8.

Proof evident is direct, certain, clear, and conclusive evidence of a fact, without the aid of intervening facts, and needs no special inference to make it appear. Proof is not evident if it is conflicting. Burrill on Cr. Ev., 4; 1 Greenl. Ev., § 13; 5 Cushing's R., 520. To constitute the accused accessory before the fact, he must have instigated, counseled, aided, or com-

manded the act. 3 Greenl. Ev., § 50; 1 Whar. Am. Cr. Law, § 134.

When the fact cannot be demonstratively evinced, that which comes nearest to it is the proof of such circumstances as necessarily or usually attend the fact; these are called violent presumptions, and sometimes equal to full proof; those circumstances appearing which necessarily attend the fact. 3 Bl. Com., 371; 3 Phil. Ev. (Cow. & Hill's notes), 286; Russell on Cr., 60–65.

Assuming everything true which the evidence tends to prove, yet if there is any other reasonable hypothesis than that of the guilt of the accused, arising from the whole testimony, it is insufficient. Algheri v. State, 25 Miss., 584; John v. State, 24 Miss., 569.

The only grounds upon which the declarations of the party are competent against another, is where there is a conspiracy, and that must be established by evidence *aliunde*. Browning v. State, 30 Miss., 656; Lynes v. State, 36 Miss., 625; Roscoe's Cr. Ev., 77; 1 Greenl. Ev., § 3; 2 Starkie Ev., 327.

The acts and declarations of a party to a conspiracy must have been made during the criminal enterprise, or pending, or before its completion or abandonment, or else, being no part of the *res gestæ*, they cannot be admitted as evidence against a confederate. Lynes v. State, 36 Miss., 625; Roscoe's Cr. Ev., 77; Greenl. Ev., §§ 11–28–283.

This court has decided that where it is doubtful whether the offense is murder or manslaughter, the party is entitled to bail. The proof evident or presumption great, must be of the taking of the life of a human being with malice aforethought. *Ex parte* Wray, 30 Miss., 678.

If there be any doubt as to the guilt of the plaintiff in error, he is entitled to bail. Bail will be granted even where a jury might, and perhaps ought, to find a party guilty of murder. Wray, *ex parte*, cited above. Moore v. State, 36 Miss., 142; Beall v. State, 39 Miss., 720. See also Revised Code, art. 3, 573.

J. S. Morris, attorney general,

Submitted an oral argument, in which he attempted to show:

1st. That the principle of the decisions of the High Court of Errors and Appeals in the cases of Wray, Moore, and Beall,[1] are frequently misapplied, and perverted by counsel in applications for bail in capital cases. It is true that the language used in those cases is to the effect that the court may sometimes grant bail "when a jury might, and perhaps ought to, find the accused guilty of murder"—language which, if accepted literally and in the mere abstract, might operate to admit to bail any murderer. however atrocious his crime, and however evident the proof.

But, he submitted, the language should not be so accepted; on the contrary, it should be carefully construed in the light of all the other theories and principles of criminal jurisprudence applicable to questions of this kind. So construed, the meaning of all these cases is, simply, that the court would not prejudge the question of a prisoner's guilt, nor the grade of his crime, but leave those questions, in all their bearings, open and free to investigation and solution by the petit jury, which shall ultimately try him upon the indictment and evidence. It is as much as to say that the judgment of no court—not even the court of last resort—upon the question of bail, is to have any weight whatever with a jury upon the final question of guilty or not guilty. Though bail shall be refused, the legal presumption of innocence shall still accompany the prisoner to his final trial before a jury of his peers, and he shall not be prejudiced there by a refusal of bail. And though bail shall be granted, that circumstance shall afford no additional presumption of innocence. The accused must still be tried on the indictment, and by the law and evidence, and his case decided without any possible reference to the circumstance of his having been admitted to bail. Regarding in this clear light the language used by the court in these three cases, they are entirely reconcilable to, and in harmony with, the general current of authority on this subject throughout all the states. And the high character and acknowledged learning of our old High Court, and of the judges of which it was always composed, forbids the conclusion that they meant or intended anything else.

[1] See 30 Miss., 681; 26 ib., 142; 30 ib., 730.

And thus construed, the words used in the cases cited leave this and every other question of bail in a capital case, to depend entirely, as it must, under our own and all other American constitutions, upon the evident character of the proof, or if there be no evident proof, then, upon the magnitude of the presumptions. By adopting this construction of the language used by the court in those cases, we shall find, after all that has been said and supposed to the contrary, that the High Court were really guided, not by the novel fancies and liberal innovations which have been attributed to it, but by the same venerable, familiar, and revered principles of law which have been generally adopted and followed from time immemorial by all the courts of appellate jurisdiction in this country.

2d. If the language of our old High Court shall be construed as meaning in reality all that counsel for the plaintiff in error have claimed in argument, then it is high time for the subject to undergo revision and readjudication.

Though at common law, according to Lord Coke (2 Inst., p. 186, *et seq.*), and Lord Hale (2 Pl. C., p. 129), the court of king's bench, in the exercise of its almost boundless discretion, might bail in any case whatsoever, even in cases of high treason or murder, because the court was held in law *coram ipso rege;* yet the practice was not to admit to bail in any case of felony where there was a strong probability of guilt.

But in the United States the accused has a constitutional right to bail in all "*except* in capital cases when the proof is evident or the presumption great."

The character of cases in which, as a class, bail shall be allowed, is thus fully and explicitly described, and separated from the class in which bail shall not be allowed. *Expressio unius est exclusio alterius*, is a maxim of law, as well as of logic, and is precisely applicable to a correct interpretation of this constitutional provision.

In this case, the return of the sheriff to the writ of *habeas corpus*, the truth of which was not denied, showed that the prisoner was held to answer an indictment for murder. This fact alone renders this "a capital case," and has frequently been held as furnishing the "presumption great," which precludes

admission to bail. 1 Morris' R., 407; 1 Mart. (La.), 142; 8 Barb., 158; 1 Park. Cr. R., 191; 3 W. C. C. R., 224; 2 Dev. (N. C.), 421. In South Carolina, justices who admitted to bail a person charged with murder, for so doing were held guilty of an escape. State v. Arthur, 1 McMullin, 456.

The circuit judge might, therefore, with perfect propriety, have refused to look further into the facts of this case than the mere indictment for murder, and have rendered a decision refusing bail upon the mere uncontradicted return of the sheriff. But, through favor to the accused, all the evidence was retaken, and upon that evidence bail was refused. The disinterested and impartial witnesses who testified on the part of the state, and the *interested* and *partial* witnesses, who, for the most part, were either *related to, or intimately associated with the accused*, and testify *for him*, were all examined and cross-examined by or in the presence of the judge; he heard their words and saw their manner. And for these reasons his judgment should not be disturbed by a tribunal having no such advantages for estimating the value of their testimony, unless it shall appear from the record that manifest error has occurred.

But it is insisted, and we cheerfully admit, that the mere statements and confessions of one of several alleged co-conspirators, considered in the abstract as such statements or confessions, are not sufficient proof against the others to establish their guilt; but that there must be other proof. 1 Greenl. Ev., § 111. But this can have no application here, because there is ample proof that there was a *quarrel* and a *cause* of quarrel between the prisoner and the deceased *before the killing*, and that the prisoner had several times given vent and expression to the malicious feelings of his heart against the deceased by threats of "revenge" against him for taking the plantation from the prisoner and "*renting it to d——d niggers.*" He had refused and persisted in the refusal to get off the place, or to take his effects away, telling his associates and his colored mistress that he should remain on the place till he should obtain his "revenge;" and in pursuance of this design, he was, in fact, still remaining on the place, with his gang of friends and relations (who are now his *witnesses!*),

when the cup of his revenge was filled by the death of his enemy.

> "If we do but watch the hour,
> There never yet was human power
> That could evade, if unforgiven,
> The patient search and vigil long
> Of him who treasures up a wrong!"

3d. It is in proof that David Roach, the drunken and imbecile brother of the deceased, whose hand perpetrated the act, had been plentifully plied with *whisky*, which had been obtained and brought to the place through the efforts and at the expense of Street; having accomplished which, and having provided Street's horse for David's immediate flight, and David being now armed with Street's derringer, and in a proper frame of mind for the fratricidal act, and all things being now ready, this prisoner and the balance of his party seated themselves in the front yard, at the distance of only a few steps, and calmly awaited the result. The fatal shot is fired, and Benjamin Roach's blood and brains fall upon the newspaper which he was reading as he sat by his own fireside! David is instantly caught by the witness McDowell, attempting to arrest him, and raising the cry of "*murder! help!*" etc. David resists and struggles towards his friends, who are still sitting, all unmoved, at their post of duty in the front yard. On the front gallery, finding himself unable without assistance to make the arrest, McDowell distinctly and repeatedly *calls again for help*, and informs Street and his party that *David had murdered his brother*. But this appeal and this information, like the report of the pistol, and like the first cries of murder in the house, fall on stony ears. They all keep their seats, more calm and unconcerned, perhaps, than Street's horse, standing saddled and hitched at the gate. But mark! *David*, drunk and imbecile though he had been only a moment before, shall utter one sentence, and its effect shall be electrical. That sentence is, "Street, if you do not come and help me as you *promised*, I will tell *who gave me the pistol!*" That sentence is uttered, and instantly Street is by his side! McDowell is pushed away, and informed that he has "no right to make the arrest without a warrant;" that *he* (Street) "is David's friend, and wants to

talk to him;" that he "*did* promise to befriend him, and will do so;" and that "David must take care of himself," &c., &c.

The tragical scene thus enacted cannot be disposed of by any rule, or by all the rules, applicable to the statements or confessions of one conspirator against his confederates. *Both* the two principal conspirators were here present, *speaking together, and acting together*, and by a concert of words and actions proving plainer than mere words can ever do, their jointly-concerted design, and their equal and united guilt. Had the words of David Roach been spoken at another and subsequent time, when Street was not present, and when his mind, if indeed he had any, had had time to concoct a story for his own exculpation, or the crimination of Street, those words would have been comparatively idle and insignificant, unless the state could have proved by evidence, *aliunde*, the existence of the conspiracy. In that case, the well-recognized rule invoked by learned counsel would have applied. But uttered as they were, at the time and place of the main fact, they were a part of the transaction itself. They are of the *res gestæ*—verbal acts—which are not only admissible, but essential to be known, because connected with the main fact, and explaining its character. 1 Greenl. Ev., §§ 108–111.

The mere words of David Roach, regarded as the vehicle of information of what *he* knew or wished to say to those who heard him, are unimportant; but regarded in their connection with the instant and involuntary *action of Street*, they acquire the utmost significance. Ingenious counsel may explain, at least by conjecture, the words of Roach; but even conjecture returns on weary wing from its search for an explanation in the realms of human reason for the conduct of Street—except that of a conspiracy.

A profound and elegant writer, quoted by both Wills and Burrill in their treatises upon circumstantial evidence, says:

"All the acts of a party, all things that explain or throw light on those acts; all the acts of others, relative to the affair, that come to his knowledge or may influence him; his friendships and enmities; his promises, his threats; the truth of his discourses; the falsehood of his apologies, pretenses and explanations; his looks, his speech, his silence where he is called to

speak; everything which tends to establish the connection between all these particulars; every circumstance, precedent, concomitant and subsequent, become parts of circumstantial evidence."[1]

Applying these suggestions to the concurrent language and conduct of these two men in the presence of this tragical crime, we ask why, if not because of his guilt, was Street silent or acquiescent to the intimation that he had furnished David Roach with the pistol? Why was he not defiant *then*, as he had been with the deceased, when he quarrelled with him about the corn, and threatened to have revenge? Why did he not challenge David Roach to make good his threat, and "*tell* where he got the pistol?" Why did he not deny *then*, as he does now, having "promised to befriend" David Roach? When the report of the pistol, and the cry of "murder!" and the struggle of McDowell with David Roach, and the loud and repeated calls for "help!" had failed, utterly, to disturb the composure of Sweet and his friends seated in the yard, why was it that David Roach's threats to expose the conspiracy caused Street to come instantly and resolutely to *his assistance?*

Upon the hypothesis of Street's innocence, his own actions, his words, and even his silence, on this occasion, are strange, mysterious, irrational and totally inexplicable, upon any of the principles or motives which ordinarily control and regulate the conduct of mankind. But, upon the hypothesis of a previously concerted agreement between David Roach *and Street* that the former should do the deed with the latter's pistol, and that the latter should then and thereafter "befriend him," all doubt and difficulty and mystery at once vanish, and the whole affair stands fully explained and reconcilable to the ordinary laws of human conduct.

4th. And if this conspiracy did exist, of what crime is the relator in this proceeding guilty? The answer is *of murder*—or, what is the same thing by the laws of this state—of being the preliminary *instigator* of, and *accessory* to, murder, *before the fact*—which, like the crime of his principal—or, more

[1] 2 Burke's Works, 616.

properly, in this case, of his *agent*, is punishable with *death*. Rev. Code of 1857, p. 572, art. 2.

This would be the grade of the offense and its penalty by our statute, if we assume that David Roach *was sane*. But if we assume, according to the tendency of some of the evidence for the relator, that David Roach was *insane*, either from mental disease or from the whisky administered by Street; then, so far as Street is concerned, there may be this technical distinction: Roach, being insane, may, for that reason, be excused from all criminal responsibility; and Street, instead of being punishable with death as an accessory before the fact, is punishable with death as *principal*.

Upon this point I refer the court to an authority from Kelyng's Reports, 52, cited by the attorney-general in the case of the Commonwealth v. Bowen, 13 Mass., 356: "Memorandum, that my brother *Twisden*, showed me a report which he had of a charge given by Justice *Jones* to the grand jury at the king's bench barre, Michaelmas Term, 9 Car. 1, in which he said that poisoning another was murder at common law. And the statute of 1 Ed. 6, was but declaratory of the common law, and an affirmation of it. If one drinks poison by the provocation of another, and dieth of it, this is murder in the person that persuaded it. And he took this difference: If A give poison to J S to give to J P, and J S knowing it to be poison, give it to J P, who taketh it in the absence of J S and dieth of it: in this case J S, who gave it to J P, is principal, and A, who gave the poison to J S, and was absent when it was taken, is but accessory before the fact. But if A layeth poison for J S, and J S, in the absence of A, taketh it and dieth of it: in this case, A, though he be absent, yet he is principal. So it is, if A giveth poison to B to give unto C, and B, not knowing it to be poison, but believing it to be a good medicine, giveth it to C, who dieth of it: in this case, A, who is absent, is principal; or else a man should be murdered, and there should be no principal. For B, who knoweth nothing of the poison, is in no fault, though he gave it to C. So if A puts a sword into the hands of a *madman*, and bids him kill B with it, and then A goeth away, and the madman kills B with the sword, as A commanded

him, this is murder in A, though absent, and he is principal: for it is no crime in the madman, who did the fact by reason of his madness."

And again: "A principal in the first degree is one who is the actor or actual perpetrator of the fact. But it is not necessary that he should have committed the act with his own hands, or be actually present when the offense is committed; for if one lay poison purposely for another who takes it, and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree. If he acts through the medium of an innocent or *insane* person, he is guilty as principal. Thus, in Sir William Courtney's case, Lord Denman, C. J., charged the jury: 'You will say whether you find that Courtney was a dangerous or mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him with their presence, and conferring in his acts; and if you do, you will find them guilty, for they are liable as principals for what was done by his hand? If the principal were insane when the act was committed, no one could be convicted as an aider or abettor. If a child under the age of discretion, or any other instrument, excused from responsibility for his actions by *defect of understanding*, ignorance of the fact or other cause, be incited to the commission of murder or any other crime, the incitor, though absent when the fact was committed, is, *ex necessitate*, liable for the act of his agent, and a principal in the first degree.'" Whar. Am. Cr. L. (6th ed.), § 112; and numerous English and American cases there cited.

On behalf of the state, we therefore confidently submit that the present is a "capital case," in which "the proof *is* evident" *and* "the presumption great." And if so, or, if the court shall consider that the proof is *not* "evident," but that "the presumption" of guilt *is* "great," we submit that the character of the crime is one of such exceeding and unparalleled atrocity as to forbid that this prisoner should be turned loose upon bail. And, upon the question of bail in such cases, the attorney-general read and made the application of the following authorities:

State v. Blackfellow, 1 Halst. (N. J.), 332; Foley v. People,

1 Breese (Ill.), 32; State v. Hill, 3 Brevard (S. C.), 89; State v. Howell, R. M. Charlton's (Ga.) R., 120; State v. Wicks, ib., 139; Comm. v. Keeper, &c., 2 Ashmead (Pa.), 227; Shore v. State, 6 Mo., 640; *ex parte* Tayleo, 5 Cow. (N. Y.), 39; State v. Summons, 19 Ohio, 139.

In the cases cited from Ohio and Pennsylvania, it is laid down as a safe rule, "*to refuse bail in all cases where a judge would sustain a capital conviction if pronounced by a jury upon the same evidence.*." 2 Ashm., 227; 19 Ohio, 139.

SIMBALL, J.:

The sheriff returned on the writ, that he held the relator in custody under arrest by bench warrant, to answer an indictment for murder.

The defendant rested his case, and moved for discharge upon or without bail; but the court refused to discharge or bail, which is assigned for error. The return of the sheriff not being controverted, as might have been done under Art. 11, of *habeas corpus* act, it showed sufficient authority to hold the prisoner in custody.

The indictment was then read, and the testimony of the witnesses taken. During the trial several questions as to admissibility and competency of testimony were made to the effect that the declarations and statements of David Roach, the actual perpetrator of the homicide, were not admissible in evidence against the relator, because there had not been proof made that the relator had conspired and confederated with Roach to kill the deceased.

It is well settled law, that before the acts and declarations of one party can be received in evidence against the other, there must be proof of a conspiracy, *aliunde*. The words themselves do not prove the confederacy or tend to prove it; and, therefore, such declarations are mere hearsay. But it is quite as well settled by authority that a "conspiracy may be proved, like other controverted facts, by the acts of parties or by circumstances as well as their agreement."

In this case the declarations objected to were made in the presence and hearing of the relator—some of them addressed to

him—and are, therefore, relieved of the objection made by the counsel, and were competent on other grounds, altogether, as tending, with other things, to make out the conspiracy.

That the judgment which we render in this case may be the better understood, we will attempt to state the principles of the law of bail as at common law, in England and the United States, and as modified by our constitution and statutes. By the early English common law, bail seems to have been a matter of discretion with all judicial magistrates and courts before whom offenders might be brought. By the ancient statute of Westminster—1 C., 13, especially—the power to bail, as to the inferior courts and magistrates, was regulated and restricted; but the court of king's bench and its judges were left unaffected by this statute, in possession of full common law jurisdiction. The celebrated *habeas corpus* act of Charles II, conferred the power to bail on the judges of the superior courts of Westminster Hall, and other superior judges. In those states of the Union which have derived their jurisprudence from the English source, this common law jurisdiction has been held to pertain to the superior courts, and has been very generally delegated by statute to the judges of the higher courts. The primary object of the great writ of *habeas corpus* was to deliver persons restrained of their liberty without any or sufficient legal cause and authority; therefore, the respondent to the writ was required, in the fullest manner, to return the caption, its date and the cause or authority of the detention, and the court, or judge, according to the circumstances of the case, either discharged, bailed, or remanded.

The court of king's bench and the judges authorized to hear and determine a case on *habeas corpus* have, according to the principles of the common law, the power and discretion to bail all persons whatsoever, and for all offenses whatsoever, without regard to the degree of the crime, or the nature of the punishment. Their power to bail in a capital case was as unquestioned as when the punishment did not reach to the life of the accused. The power and the discretion being thus co-extensive, and their exercise discretionary, it is important to look to the practice and the principles on which the courts and judges pro-

ceeded. The rule as laid down by Hawkins, b. 2, chap. 15, §§ 20 and 80, is, "that persons convicted of felony, or who have confessed their guilt, or are notoriously guilty of treason or manslaughter, by their own confession or otherwise, are not to be admitted to bail without some special motive to induce the court to grant it, for bail is only proper where it stands indifferent whether the party is guilty or innocent of the accusation against him, as it often does before the trial; but when that indifference is removed it would be absurd to bail."

In Rex v. Dyer, 2 C. & P., 77, the application to bail was on the ground that the offense imputed was not a felony; but the court being of the opinion that it was a felony, bail was refused. So in Rex v. Marks, 3 East, 163, it appearing from the depositions taken before the coroner's jury that the crime charged was felony, the prisoner was remanded.

The court refuses to receive extrinsic evidence, confining itself to the return, and the depositions before the committing magistrate or the coroner. If the return be legally sufficient, the court cannot try the fact on affidavit, nor can the return be pleaded to, nor can an issue be made upon it. 1 Bacon Abr., title Bail, 589; 4 S. & R., 757; 4 Burr., 2530; 1 Chitt. Crim. Law, —; 1 Hawk. P. C., chap. 15.

In Tayloe's case, 5 Cowen, the relator was under indictment for manslaughter, which was not a capital felony. The supreme court of New York had the same discretionary power to bail as the king's bench in England. The three judges delivered their opinions, *seriatim*, and the subject of bail as to the power, the right, and the practice, was very thoroughly considered on the authorities. The conclusion reached was, that in felonies bail would not be granted before indictment, unless in special circumstances; among others, the probable innocence of the accused; and such was stated to be the practice from a review of the decisions and accredited text-writers. After indictment the accused ought not to be bailed. The finding of the grand jury is taken as furnishing a strong presumption or probability of guilt. Other considerations will influence the discretion of the court, as when the prosecution has been unreasonably delayed, or the life of the person is endangered by

some distemper or sickness threatening life, which has been induced by the confinement. 1 Bacon Abr., 589.

The right to bail, as it stood at common law, was considered by our predecessors in the case of *ex parte* Dyson, 25 Miss. Rep., 359. In the very sound and judicious opinion of the court, after stating that the constitutional provision, art. 1, sec. 17, only applied to bail before conviction, and that after conviction the right of the prisoner remained as at common law, while declaring the power as plenary, it added: "While the power is admitted, it should be exercised with great caution, and only when the peculiar circumstances of the case render it right and proper." "The court is governed entirely by a sound judicial discretion." "There must be some special motive to induce the court to grant bail." Dyson had been convicted of a felony not capital, and his case was pending in the high court awaiting a re-argument. Under the *habeas corpus* act of Charles II, the judges would not look into testimony, *aliunde*, but regarded the finding of the grand jury as conclusive upon them.

The writ of *habeas corpus* is in nature of a writ of error, to examine into the legality of the imprisonment, and, therefore, it commands the caption and cause of detention to be returned. If the relator was in custody by commitment of a justice of the peace or other inferior magistrate, the custom was to send with the writ a *certiorari* to send up the depositions on which the commitment was predicated. If there was no pretense of imputing to the prisoner an indictable offense, he will be discharged. But it is more usual to bail or remand, according to the nature of the charge. I Chit. Crim. Law, 111–128.

As already stated, the king's bench and its judges have power to bail for any offense whatever before or after conviction. But this is not a wild, irresponsible discretion, left to the caprice or individual judgment of each judge; but a *legal* discretion, regulated by the rules and practice as contained and expounded in the adjudged cases. 1 Chit. Cr. L., 128. As said by Ch. Justice Marshall, "regulated according to the usages of law."

In the case of Bennoit, 1 Martin La. Rep., 142, the prisoner had been indicted for an assault with intent to kill and murder,

—then a capital offense. In response to a motion to let to bail, the court said:

"Bail is never allowed in offenses punishable with death, where the proof is evident, and the presumption great."

On a coroner's inquest finding a party guilty of murder, the judges have often looked into the testimony which the coroner is bound to record, and when they have been of opinion that the jury have drawn an illogical conclusion, admitted the party to bail. "But the judges cannot help considering the finding of the grand jury as too great a presumption of the defendant's guilt to bail him."

In Burr's case (by Robinson 1, 301–308), after indictment, application was made for bail. Marshall, C. J., after considerable discussion, said: "The act of Congress, in express terms, enabled the court to bail a person arrested for treason. There was no distinction between treason and other criminal cases, as to the power to bail upon arrests; but an arrest might be after the finding of a grand jury, in which case the finding of the grand jury would be the evidence on which the court would have to judge whether the party arrested ought to be bailed. They were to exercise their discretion according to the nature and circumstances of the offense, and of the evidence, and *usages of the law.* The usages of law were to be found in the common law and the practice of the courts." But he "doubted extremely whether the court had the right to bail after indictment for treason." Mr. Burr and Luther Martin asked for time to search for precedents. No authorities were produced by them, and bail was denied.

In McLeod's case, 25 Wend. Rep., the prisoner was indicted for murder. Bail was refused. The court declined to receive proof of an *alibi* by the relator, at the time of the murder.

Ch. Jus. Raymond, in Rex v. Dalton, 2 Str., 911, thought the indictment conclusive.

State v. Miller, 2 Dev. N. C., 421, Ruffin, J., said: "After indictment found, a defendant is presumed guilty for most, if not all purposes, except that of a fair and impartial trial before a jury. This presumption is so strong that, in a capital felony, the party cannot be let to bail."

Hight v. United States, 1 Morris' (Iowa) Rep., 407, commenting on the effect of an indictment, under a statute forbidding bail in a capital case, "where the presumption is great, or the proof evident," the court said: "An indictment furnishes no presumption when upon trial; but so far as regards all intermediate proceedings between the indictment and trial, it furnishes the very strongest possible presumption of guilt. The finding of the grand jury is conclusive so far as to control proceedings up to the time of trial. The humanity of our law requires, before a person shall be punished as a criminal, he must be found guilty by two independent juries. The verdict of the first raises a full presumption of guilt up to the time of trial before the second."

We will now examine the modifications made by positive law in this state.

The 10th art. of *habeas corpus* act, Code, 366, directs the judges to proceed to inquire into the cause of imprisonment or detention, and may either discharge, bail, or remand, as the law and the evidence may require.

The return shall not be conclusive as to facts therein stated, but evidence may be received to contradict the same.

The return in this case is, that the prisoner is held to answer an indictment for murder. We have seen that, at the common law, on such returns made to the court of king's bench, or to an American court of superior common law jurisdiction, although their right to bail, in any case, and for any offense, without regard to the degree of the crime, or the severity of the punishment, was plenary. Yet the "usages of the law" had so shaped and regulated the discretion of the courts, that, generally, bail was denied after indictment for a felony, unless some special motive was shown, though the felony was not capitally punished; and that in capital cases, the motive or reason for bail must arise in point of time after indictment, such as the delay by the prosecution to bring on the trial, the danger to the life of the accused, occasioned by the imprisonment, &c., &c.

At common law, the return of the sheriff on the writ would not be disputed, and the court looked to that to judge of the rightfulness of the detention.

By the 11th art. of our act, the return may be disputed by evidence. Again, the judge before whom the prisoner is brought shall immediately proceed and dispose of the case according to the law and the evidence; and may summon witnesses, &c., &c.

The writ "extends to all cases of illegal confinement or detention whatever." Its primary object is to deliver from "illegal confinement." Where the return shows, as in this case, that the prisoner was arrested by a bench warrant, which commanded the sheriff to "take and safely keep the relator," to answer an indictment for murder, the "detention" was perfectly legal. Where the prisoner is in confinement, charged by indictment with a capital felony, his petition for the writ, instead of stating, as in this case, that his imprisonment is illegal and without warrant of law, ought to claim that he is entitled to be enlarged on bail, under the section in the bill of rights; for no one would pretend that the judge can discharge, even on the clearest proof of *innocence*.

The practice of the courts and judges, under the *habeas corpus* act of Charles II, and of the American courts and judges, where the common law was not modified, was to remand to custody, where the return showed that the prisoner was under indictment for a capital crime, and they would not hear affidavits or witnesses in exculpation.

The 8th section of the bill of rights introduces a material modification. It makes bailable all crimes (which the common law did not, as a matter of right), "except capital offenses, where the proof is evident or the presumption great."

In Davis' case, 6 How., Miss. Rep., 403, it was remarked by the court: "It is believed that the clause of the constitution was intended by its framers for the better security of the citizen against an improper exercise of discretion with which the common law clothed the judges, and to take from them all discretion whatever, before conviction—only when it becomes necessary to discriminate between capital and minor offenses"—"leaving the discretion after conviction, as at common law."

Under the bill of rights, bail before conviction is a matter of right (and not of discretion) for all offenses, except those

that are capital, "where the proof is evident or presumption great."

Perhaps the original of the section in our bill of rights, and in the constitutions of nearly all the states, is a clause in the ordinance of 1787 for the government of the territory northwest of the river Ohio. This ordinance was mainly prepared by Mr. Jefferson, it is said. The words of the ordinance are: "All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great." As that territory was formed into states, this provision in the ordinance was, in terms or with slight modifications, incorporated into their constitutions, and for many years has held a place in the constitutions or statutes of nearly all the states. In 1845 the supreme court of Iowa passed on the effect of the ordinance, which had been incorporated into their constitution. It was contended in the case of Hight (1 Morris Rep., 407), who was under indictment for murder, that "liberty be given him to prove and satisfy the court that the charge in the indictment was not based 'upon proof that was evident and presumption great,' and, therefore, he should be let to bail." For the state it was contended that "the indictment furnishes such proof or presumption, and that evidence behind the indictment ought not to be received." It was held by the court that the indictment was conclusive, that no evidence ought to be received; and the application was overruled. The chief justice said: "This is no new provision, but is in express terms incorporated into the constitution of at least half the states, and is the rule of action in all the rest. If the construction contended for be correct, it is a little remarkable that no case can be found where a similar application has been successfully made."

The bill of rights and the statute of our state are not broader or more liberal than in the other states. The *right* continues until conviction.

Until the decision in Wray's case, 30 Miss. Rep., 681, the practice in this state is believed not to have been uniform. In some of the circuits the judges held the indictment for a capital felony as raising conclusively the "presumption great," and declined to examine witnesses.

Since Wray's case, the practice has become uniform, and evidence, *aliunde*, the indictment is received, and this has been considered as settled. On the hearing of the *habeas corpus*, is the indictment placed entirely out of consideration? If so, it becomes a question of guilty or not guilty, on the evidence. Yet it is quite certain that is not the issue; for it were absurd to say that the judge could discharge, however clear the proof of innocence might be. Nor is it in any sense a review or revisal of the grounds of the action of the grand jury, for the judge cannot revise their finding, or put the party on final trial for a less grade of crime.

On the hearing in this case, the issue submitted to the judge was, "Is the presumption great, or the proof evident, that the prisoner is guilty of a capital crime?" The indictment and the testimony were all to be considered in forming a judgment.

When closely reflected on, very serious embarrassments attend the decision of a case brought from the judgment of the circuit judge, where the case turns mainly on the testimony. We feel it sensibly in this case. Nearly every case that we have examined in the English and American books (except those in this state) were *original* applications for bail. In nearly all of them, where the point was referred to at all, the judges declined to go into an analysis of the evidence, to determine as to guilt or innocence. That, say they, "is the province of the jury."

Any discussion we might make, or any opinion we might come to on the subject, might have an injurious effect on the jury trial.

"So much depends on the manner of witnesses, their seeming bias or fairness, that cannot be brought before this court," "which should yet have a material bearing on the weight of evidence," that we would pause long before we would disturb the decisions of the circuit judge, where the weight of the evidence depended on the credibility of witnesses—for he had far, very far, better means of detecting the false, biased, prevaricating witness, than this court—means, indeed, which by the secondary channel of a bill of exceptions, cannot be brought before this court.

We are exercising over this writ of error a purely revisory,

correctional jurisdiction. We have no larger jurisdiction, or discretion to bail—where a case is before us on a writ of error—than the judge or court whose judgment is before us. Indeed, there is nothing in the law to warrant us in dealing with such a case, in any sense, exceptional. We must regard this judgment as presumptively right, until error is shown.

It appears in this case that the witnesses were, in important particulars, conflicting, if not contradictory; that necessarily the question of credibility arose—and assuming that question as settled in the mind of the judge in one way—there are very strong inculpating facts. Touching these matters, the circuit judge had far better opportunities, and was in more favorable circumstances to come to a safe, reliable, and just opinion, than this court.

The grand jury, who had the advantage of a personal examination of the witnesses, *ex parte* to be sure, have charged the party with murder. The circuit judge, with the like examination of such witnesses as were brought before him, has denied bail.

The facts in the record do not raise the question of the degree of the crime—murder or manslaughter. On that subject there can be no doubt. And as manslaughter is included in an indictment for murder—and a conviction of the lesser offense can be sustained under a charge of the greater—there might be great propriety in this court looking at testimony with the view of ascertaining what grade of crime the evidence fixes.

We suppose the main object of allowing a review at all, was to correct the errors of law which might materially prejudice the relator, rather than to estimate and criticise the testimony as to its weight and criminating effects. If the circuit judge excludes testimony material to the defense; if he has clearly mistaken the grade of the felonious homicide to the disadvantage of the prisoner; if he holds a party restrained by arbitrary power, or by private force, or by the sentence or order of a tribunal without jurisdiction; or if he refuses bail on testimony too weak to raise "great presumption, or evident proof"—for the correction of such errors as these, the revisory powers of this court were, in our view, mainly conferred.

"What is meant by the words "proof evident or presumption great?" The judges, as the authorities which we have examined show, were accustomed to look at the depositions before the coroner, or magistrate, to see whether there was probable felony committed by the accused. If he was clearly innocent, they discharged—but if strongly inculpated, they generally refused bail.

After indictment, however, they declined altogether any examination into the *corpus delicti*, accepting the finding of the indictment as strong probability of guilt.

Therefore, in Burr's case, after indictment, bail was denied; therefore, in Bennoit's case, the supreme court of Louisiana declared that the indictment raised the "presumption great;" therefore, in Hight's case, the supreme court of Iowa, attached the same effect to the indictment. It was because the probability of guilt was heightened, by indictment, beyond what it was by the *mittimus* of a justice of the peace, that bail was denied in Tayloe's case, 5 Cowen, and McLeod's case, 25 Wend.

If on the hearing of this case, neither the prosecution nor defense had offered testimony, what would have been the duty of the judge? Bail, or remand? To discharge was absurd and impossible. There can be hardly doubt that this prisoner must be remanded; for the reason that the matter of the return creates the "presumption great," meant by the bill of rights. The return then contained ample authority to hold the relator in custody, unless its force were broken—the *prima facie* case it made, overcome by the testimony.

We are not left entirely to the results of our own reflections on this point. There is much force in the words of the Pennsylvania court, in the case of Commonwealth v. Keeper of Prison, 1 Ashmead, 234. The Pennsylvania constitution contained precisely the provisions of the section of our bill of rights: "All prisoners shall be bailable, unless for capital felonies where the proof is evident, 'or the presumption great.'" The judge said: "Assuming murder in the second degree to be a bailable offense, yet the power to discriminate and decide upon the degrees of murder pertain to the jury which tries the offender, and is not properly exercisable by the judge, on the

question of admitting to bail. In a given case, where a malicious homicide should be clearly shown, and in which the presumption was reasonably strong to take away life, I should pause before I would undertake to decide as to what degree of murder the perpetrator was guilty of, in such an inquiry as that before me. It is difficult to lay down any precise rule for judicial government in such case; but it would seem a safe one to refuse bail in a case of malicious homicide, *where the judge would sustain a capital conviction pronounced by a jury on evidence of guilt, such as that produced on the application for bail*, and to allow bail where the prosecutor's evidence was of less efficiency. This affords a *practical test* by which the granting or *refusing bail* may be *readily solved*."

These views are referred to with approbation by the supreme court of Ohio in case of State v. Simmons, 19 Ohio Rep., 141; and the court proceeds: "So with us in Ohio, if the evidence exhibited on the hearing of the application to admit be of so weak a character that it would not sustain a verdict of guilty against a motion for a new trial, the court will feel it their duty, under the constitution, to bail the prisoner." The article in the Ohio constitution is precisely like ours. In this case there had been a disagreement of the jury on one trial, and that circumstance was an element in the case. If the testimony should make the impression on our minds that the petit jury might and ought to convict, on the same testimony, we would not hesitate to declare that the circuit judge did not err in declining to bail.

In Lumm v. State, 3 Porter (Indiana R.), 393, the application was after an indictment for murder. The relator in his petition admitted the legality of his arrest and detention; but claimed that his offense was less than murder, and bailable. The court on their statutes allowed an examination of witnesses, for the reason that "the indictment is not conclusive of the grade of the offense; the prisoner may be convicted of murder in the first or in the second degree; or of manslaughter." (The last two not capital.) The prosecuting officer very often prefers but one count for murder, when the crime intended to be imputed is murder in the second degree, or manslaughter.

After indictment, on *habeas corpus*, the only possible inquiry can be as to the grade of the offense, or the strength of the evidence. It is not a question of guilt or innocence absolutely —for there is no power to discharge. But if on the testimony there is no doubt that a murder has been committed (and no point can, therefore, arise as to the grade), but the issue is as to the guilty complicity of the relator with the perpetrator—and that issue depends in a great degree on the credibility of witnesses—it would be going very far in the appellate court to reverse the judgment of the court, who saw, heard, and observed the witnesses. That, as it seems to us, is the case made by this record of the facts.

In the case of Wray, 30 Miss. Rep., 142, and Beall's case, 39 Miss. Rep., 720, the court deemed it "proper to withhold the grounds of its opinion, as the cases were to undergo a jury trial, whose province it was to determine the guilt or innocence of the accused." In these cases the only question that could arise, was as to the grade of the homicide, or its sufficiency to criminate at all—and we are left to inference as to the opinion of the court on the point. Appreciating the delicacy of arguing on the testimony in advance of the jury trial, as to its criminating or exculpatory effect, we have only attempted to deduce from the practice and precedents of the courts, the principles of law on this subject, which have conducted us to the conclusion that, in the circumstances of this case, we ought to affirm the judgment of the circuit judge.

Judgment affirmed.

NOTE.—The Reporter learns by a note from one of the learned counsel for Street, that he has been finally acquitted of this charge by a jury of Yazoo county.

KELLOGG *v.* STATE, 43 Miss. R., 57.

PRINCIPAL AND SURETY.

A defendant to indictment being at large on bail, may, at any time, be surrendered by his bail to the sheriff of the county in which the indictment is pending; and the sheriff may again admit him to bail or recognizance with new sureties.

The conditions of a recognizance being that a defendant shall appear before the

circuit court of the county, on the 4th Monday in May, that being the time fixed by law for the commencing of the court, and no year being specified, held sufficient to fix the liability of the surety in case of default at the next term of the court.

Error to the circuit court of Yazoo county. SHACKLEFORD, J.

Wilkinson and *Bowman*, for plaintiff in error,

Filed the following assignment of error:

The court below erred in overruling the motion to set aside the judgment against the plaintiff in error, surety in the recognizance of Samuel Bibb.

Bibb was indicted for petit larceny, and entered into recognizance with one Jones as surety. Jones surrendered him to the sheriff, who took another recognizance with plaintiff in error as surety. This last recognizance did not specify the term of court at which Bibb was to appear. For this reason we think this recognizance was void.

"A sheriff can only take recognizance when the offense is committed in his presence or view, when the offender is arrested by him upon legal process in his hands, or upon *mittimus* or order of court." Revised Code, art. 129, p. 126; art. 287, p. 619.

A sheriff has no authority, under the statute, to take recognizance, except in a case where he may arrest a person by process of law. Pace v. State, 25 Miss., 54. He has no authority in this matter except what is granted by the statute, and he must keep within that, or else his acts are void. The case of Lewis v. The State, 41 Miss., 686, does not conflict with these views. In the latter case, David, the accused, at the time the recognizance was executed, was a slave, incapable of contracting; and his master, Lewis, was his surety. The principal was not under recognizance at all, but simply in the actual custody of Lewis until his freedom.

A recognizance returnable to a term of court not fixed by law, is void; and a void recognizance may be vacated at any time. Butler v. State, 12 S. & M., 470.

J. S. Morris, attorney general.

A surety on recognizance may be released from continued liability, by surrendering the principal. Lewis v. The State, 41 Miss., 686; 2 Story on Contracts, p. 547, §§ 975, 976; 1

Archbold Crim. Pr., 203; 1 Bishop Crim. Procedure, § 696; Harp v. Osgood, 2 Hill, N. Y., 216; Commonwealth v. Brown, 14 B. Monroe, 631; State v. Le Serf, 1 Bailey, 410.

The surrender of the principal may properly be made to the sheriff, because that officer may commit the prisoner to jail or take bail. Revised Code, p. 619, art. 288. State v. Brown, 32 Miss. R., 275. And the power of the sheriff to take bail, is a sufficient reason why such a surrender should be held sufficient. 1 Bailey, 44; Lawrence v. The State, 1 Carter, 359; The State v. Mahon, 3 Harrington, 568; Stevens v. The State, 2 Blackf., 104.

TARBELL, J.:

The facts in this case, as set forth in the bill of exceptions, are substantially these:

At the May term of the circuit court of Yazoo county, 1868, one Samuel Bibb was indicted for petit larceny. A bench warrant was issued, on which Bibb was arrested by the sheriff of that county, September 22, 1868, and on the same day let to bail by the sheriff, with one David Jones as surety.

Bibb was tried, convicted, and a new trial granted at the November circuit court, 1868. No order was made by the court discharging the surety, and on the 29th day of November, 1868, after the adjournment of the court, Jones, the surety, becoming uneasy as bail for Bibb, surrendered him to the sheriff, who thereupon let Bibb to bail with the plaintiff in error as surety, the recognizance being conditioned for the appearance of Bibb on the fourth Monday of May (without specifying the year), before the circuit court of Yazoo county. This last recognizance does not recite the surrender of Bibb by Jones to the sheriff, but is in the common form of recognizances. Bibb failed to appear at the term succeeding this recognizance. The usual steps were taken, and at the January term, 1870, judgment final was entered against Bibb, and Kellogg, his surety. Kellogg at that term made a motion to set aside the judgment thus obtained, which motion was overruled. From the decision and action of the circuit court in overruling the motion to set

aside the judgment, the defendant, Kellogg, brings this writ of error.

The solution of this case is found in Art. 129, p. 126, of the Rev. Code. By this article there are two classes of cases in which the sheriff may admit offenders to bail, to wit:

1st. When the offense is committed "in his view."

2d. He is "authorized to take bonds, recognizances with good and sufficient sureties, of any person or persons whom he may arrest on the process of any circuit court, charged with any crime or misdemeanor not punishable with death, conditioned for the appearance of the offender or offenders at the next term of the said court, and to fix the amount of such bond or recognizance, in case said court or judge has omitted to do so, unless such process be made returnable forthwith, during the term of the court at which the same is awarded."

The action of the sheriff in this instance seems to be in strict conformity to this article, because:

1st. The court had "omitted" to "fix the amount of such bond or recognizance."

2d. The process was not returnable forthwith, during the term of the court at which the same was awarded, but the court had adjourned, and process was issued in vacation, returnable to the next term of the court.

3d. The admitting of Bibb to bail by the sheriff, in September, with Jones as surety, was unquestionably correct.

4th. The result of the surrender of Bibb by Jones to the sheriff, without any action of the court as to the recognizance, was twofold: First, it released Jones from further liability; second, it replaced Bibb in custody of the sheriff upon the original process. The sheriff could now commit him to prison, or admit him to bail, without reference to anything that had transpired. At most, the second recognizance was only the substitution of Kellogg for Jones, but it was as though none other had been taken, and as though it was the first and only recognizance in the case. It is not necessary to consider the effect of the written undertaking of the surety, subscribed by him, but we apprehend that, upon investigation, it would be fatal to the objections raised by him on this writ of error

That sureties in criminal cases can surrender their principal in this and other states, as well as in England, is well established, both in law and practice, and that the sureties are thus released from continued liability is equally well settled.

An eminent author, quoting Hawkins, P. C., says: "A man's bail are looked upon as his jailors of his own choosing, and the person bailed is, in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed as if he was in the actual custody of the proper jailor." The same author also says: "A person who is bail may arrest his principal anywhere." "So, also, the right of a man who is bail to surrender his principal, and thus discharge himself, exists with us."

A learned judge of Massachusetts said: "In legal contemplation, a prisoner, notwithstanding he is bailed, remains in the custody of the persons who become his bail, and they have a right, at any time, to discharge themselves by a surrender of their principal." The mode of making, and the officer to whom to make the surrender, are specially pointed out by statute in most of the states.

It may be laid down as a general rule, that the surrender should be made to an officer authorized to admit to bail, or to commit to jail.

In this state, the powers and duties of the sheriff in this regard are regulated by Arts. 287, 288, p. 619, Rev. Code, upon the directions of a committing magistrate, or orders of the court; or upon his own responsibility, in cases specified in Art. 129, p. 126.

In the matter under consideration, we think the conduct of the sheriff correct, and that the judgment of the court below should be affirmed.

WOODS v. STATE, 43 Miss. R., 364.

HOMICIDE.

The separation and dispersion of the jury, in a capital case, has always the effect to vitiate a verdict of guilty.

The separation and dispersion of a jury, in a capital case, though by the consent, or even at the request of the prisoner on trial, vitiates a conviction.

If it appear that the jury trying a capital case in which a conviction was had, were so exposed to intercourse with others as that they *might* have been subjected to corrupting or improper influences, that fact alone will nullify their verdict. The only safety for the purity and integrity of jury trials is in the absolute exclusion of all opportunity, during the trial, for the exertion of improper influences on the men composing the jury.

Error to the criminal court of Warren county. OSGOOD, J.

The defendant, Robert Woods, was indicted by the grand jury, at the November term, 1869, of the criminal court of Warren county, for the murder of his wife, Amanda Woods; and at the following term in February, 1870, was tried and found guilty as charged in the indictment. In the progress of the trial, the jury were permitted by the court, at three several times, at the request of the prisoner's counsel, to separate and disperse under instructions from the court; and, as appears by the affidavit of the deputy sheriff, were seen freely mingling and conversing with the people. While the jury was being empaneled, Jacob Sanguinetti, summoned on the special *venire*, being sworn as to his qualifications as a juror, and being asked by the attorney for the state if he had any conscientious scruples in regard to the infliction of capital punishment, answered that "he had, and that those scruples might, or might not, influence his verdict; and that although, upon sufficient evidence, and under the instructions of the court, he would find a verdict of guilty, yet he had some conscientious scruples about inflicting capital punishment." At the same time, Robert Henry, another juror, being sworn, answered in reply to the same questions, "that he had conscientious scruples about inflicting capital punishment; that he thought it a harsh way to administer the law." The court discharged them as incompetent, and the prisoner excepted.

The evidence introduced by the state upon the trial, estab-

lished the following facts: About 8 or 9 o'clock on a Sunday morning, Amanda Woods, wife of the defendant, was sitting in the house of one Mitchell, having her hair combed, when the defendant came to the door where several other persons were sitting, to whom he spoke in a polite and civil manner, and then in the same way to his wife. That he seemed calm and peaceable, manifesting no intention to harm any one. After standing a few moments at the door, he entered the house where his wife was, and asked her if she was going to live with him any more; to which she replied, no. He said that was what he had been wanting to know for a long time, and almost immediately fired a pistol, shooting her in the back, inflicting a wound, from the effects of which she soon afterwards died. The prisoner then started out of the house and snapped the pistol at his own head twice, and at the third attempt fired, the ball entering behind the ear. After he had fallen to the ground, he was heard to say, "he wished he was dead, so that he could go along with his wife." One of the witnesses stated that she heard him say, "If she can't do me any good, she shan't do anybody else any good."

On the part of the defense, but one witness was produced, Dr. Whitehead, who, as an expert, testified in substance as follows: "I am a physician by profession; have been practicing medicine about eleven years; the medical profession are much divided in opinion on the question of insanity in all cases of suicide; I think the majority of the profession believe that persons do sometimes commit suicide when not insane; but there is a large and respectable minority of the profession who believe that the act is never committed by a person except under the influence of mental disease."

Booth, *Young* and *Brien*, for plaintiff in error.

1st. In all capital cases the separation of the jury vitiates the verdict of guilty. 4 Sharswood's Blackstone, 359; Commonwealth v. Roby, 12 Pick., 496; Hare v. State, 4 How., 187; People v. Douglass, 4 Cow., 26; Brant v. Fowler, 7 ib., 762; Commonwealth v. McCall, 1 Va. Cases; McLean v. State, 10

Yerg., 24; Perkins v. Knight, 2 N. H., 474; McQuillen v. State, 8 S. & M., 587; Eastwood v. People, 3 Park., 25; McCann v. State, 9 S. & M., 465; Lewis v. State, 9 ib., 115; Boles v. State, 13 ib., 398; People v. Hartung, 4 Park., 265; Nelms v. State, 13 S. &. M., 500; 4 How., 187; 10 Yerg., 141; Wesley v. State, 11 Humph., 502; Wiley v. State, 1 Swann, 256; 7 Cow., 562; 12 Pick., 496; 1 Va. Cases, 271; 13 Mass. R., 220; Pope & Jacobs v. State, 36 Miss., 121; Organ v. State, 26 Miss., 83; Caleb v. State, 39 Miss., 721.

2d. Although a juror may be opposed to capital punishment, if he can render a true verdict according to the evidence, he is impartial and competent. Boles v. State, 24 Miss., 445; Com. v. Webster, 5 Cushing, 295.

3d. That the prisoner in this case is entitled to the benefit of any doubt resting upon the question of sanity, and that the burden of proof, beyond a reasonable doubt, to establish defendant's capacity to commit the crime, is on the state. Dr. Ray, in his Medical Jurisprudence of Insanity, speaking of suicide, says: "To the healthy and well-balanced mind, suicide appears so strange and unaccountable a phenomenon, that many distinguished writers have regarded it as, in all cases, the effect of mental derangement, whilst by many others it has, with still less reason, been viewed as always the act of a sound, rational mind. Neither of these views can be supported by an impartial consideration of all the facts, and the truth probably lies between the two extremes." In the case of McCann v. Commonwealth, 16 N. Y., 58, it was held, that "If there be a doubt about the act of killing, all will concede that the prisoner is entitled to the benefit of it; and if there be any doubt about the will, the faculty of the prisoner to discern right and wrong, why should he be deprived of the benefit of it, when both the act and the will are necessary to make out the crime?" See also, Smith v. Commonwealth, 1 Duvall Ky. R.; Hopps v. People, 31 Ills.; Chase v. People, 40 ib.; Pope v. Slater, 19 Ind., 470; 1 Greenleaf on Ev., 95, Redfield's ed., note 81; Bennett & Heard's Lead. Cr. Cases, 87; Note to Commonwealth v. Rogers, 347.

J. S. Morris, attorney general, for the state.

1. The separation of the jury in a capital case, pending the trial, would be liable to exception if done without the consent of the prisoner; but in this case it was permitted by the court, not merely with the consent of the prisoner, but upon his voluntary motion. As to whether such consent cured the error, see Whar. Am. Crim. Law, § 591, 6th ed., and the numerous decisions there cited.

2. That the jurors named were properly challenged and stood aside because of conscientious scruples against capital punishment, see Whar. Am. Crim. Law, § 3020; Williams v. The State, 32 Miss., 389.

3. There is no proof of insanity in the prisoner except such suspicion as might arise from his attempt, or rather his *pretended* attempt, to take his own life. This is clearly insufficient, because, admitting the scientific proposition of insanity in all suicides, to have been doubtful before, that doubt was removed by the prisoner's own witness, Dr. Whitehead, who stated that this assumption is disputed by a majority of the medical profession, and by the weight of medical authority. Insanity, like that of any other abnormal fact, must not be presumed, but must be proved in all cases where it is relied on as an excuse for crime. Whar. Am. Crim. Law, 6th ed., 711, and the authorities there referred to. Comm. v. Rogers, 7 Metc., 500; 1 Bennett and H., L. C. C., 94, and note. Also, Bovard v. The State, 30 Miss, 600.

PEYTON, C. J.:

In this case, the prisoner was indicted at the November term, 1869, of the criminal court of Warren county, for the murder of Amanda Woods, his wife, and at the ensuing February term of said court was found guilty by the jury.

A motion was made for a new trial and overruled, and sentence of death was pronounced upon him by the court, and from that judgment the prisoner prosecutes here this writ of error.

It appears from the record, that the prisoner having been arraigned at a former term of the court, was put upon his trial.

at a subsequent term, on the 14th day of February, 1870; and the jury having heard part of the evidence, were on motion of the prisoner's counsel permitted to disperse and go at large, under the instructions of said court, until ten o'clock of the next morning. At that hour the jurors met the court, and the trial proceeded; and all the evidence given in the cause having been heard by the jury, they were, in the evening of that day, again permitted to disperse under the instructions of the court until ten o'clock the next morning, by the consent of the defendant's counsel and that of the prosecuting attorney.

It appears from the affidavit of Cooly Mann, the deputy sheriff, which was read upon the trial of the motion for a new trial, that on the morning after the first day's trial of the accused, he saw some of the members of the jury in the court-house yard, talking and mingling with citizens, who were not members of that jury.

The main question presented by this record for our decision is, whether, for these separations of the jury, a new trial ought to be granted.

It is of the utmost importance to the administration of justice, that the purity of the trial by jury should be preserved. And time and experience have shown the wisdom of the common law, which forbids the separation of a jury in the trial of a capital case before they have been discharged of the prisoner, and an adherence to which, modified as it has been in some of its harsh features, by modern practice, is best calculated to effect that end. Departures from the common law rule in capital cases, should be as few as possible, and only allowed in extreme cases, and never for the comfort or convenience of the jurors. For if this were allowed, it is not too much to say that few influential culprits would ever be convicted, and that few friendless ones, pursued by powerful persecutors, would escape conviction. Jurors are as open to prejudice from persuasion as other men; and neither convenience, comfort nor economy ought to be consulted, in order to guard against it. When selected to perform the important duties of jurors, they are withdrawn from the crowd, and must, necessarily, be subjected to some wholesome legal restraints for the purpose of guarding

them against improper influences, and to secure that confidence in the honesty and purity of their action, so essential to the administration of justice. Let them have every comfort compatible with their duties; but let them not be exposed to the influence of those who might pervert their judgment. The stream of criminal justice should be kept as pure as possible, and not be thus exposed to the chances of pollution from extraneous influences.

In the case of Hare v. The State, 4 How., 187, Chief Justice Sharkey, in delivering the very able and lucid opinion of the court in that case, says: "If the verdict be given under circumstances which might conduce to an improper influence, or the natural tendency of which might be to produce bias or corruption, it cannot then be said to be above suspicion; and if it be not, it must fall short of that perfection which the law requires, and which, under a more guarded administration, it is capable of producing. It is not necessary that an attempt should be made to bias the minds of the jurors, or that any pernicious influence should be exerted. The door to tampering is to be closed. This is the only security. For if it be left open, it may be predicted with certainty that the evil consequences will fall somewhere." If the purity of the verdict *might* have been affected, it must be set aside. A verdict on which doubts might rest, cannot be good. It must command entire confidence. And this is the doctrine of the cases of the Commonwealth v. McCaul, 1 Virginia Cases, 271; and McLean v. The State, 10 Yerger, 241. In neither of these cases of Hare, McCaul, and McLean, was any such thing as tampering with the jury shown; and the courts held that to be unnecessary, and say that it is sufficient that they *might* have been subject to improper influences. In order to maintain the purity and integrity of this species of trial, great care and precaution on the part of the courts should be observed to guard the jury against improper influences; and the more effectually to do this, we hold the only safe practice to be to regard the separation of the jury, even by the permission of the court, during the trial of a capital case, either with or without the consent of the prisoner, except in a case of great necessity, or the separation of any of

the jurors from their fellows during the progress of the trial, without being attended by a proper sworn officer, to be conclusive evidence of such an irregularity as will vitiate the verdict and render a new trial necessary.

In the case of Organ v. The State, 26 Miss., 83, the court say: "If any separation is to be allowed, without incurring the imputation of irregularity, for what length of time and for what purpose may it be? How frequently may it be practiced, and to what distance may it extend? By what means are communications between the jurors and other persons, which may take place, and which must necessarily be secret, to be disclosed?" These considerations show the dangerous uncertainties to which such a loose practice would lead, and the soundness of the rule above indicated, that every such separation should be considered as absolutely and conclusively vitiating the verdict. The doctrine that in such cases the verdict would only be *prima facie* vicious, and open to explanation, would lead to an inquiry as to the effect of the communications between the jurors and other persons, which would necessarily imply a sort of impeachment of their conduct, from which they would naturally endeavor to exculpate themselves, by attempting to show that those communications had no influence in procuring the verdict. The statements of the juror, who would so far disregard the obligations of his oath, and the duties which, as a citizen, he owes to the community in which he lives, as to permit himself to be tampered with, and of the person who is capable of tampering with him, must be received with many grains of allowance, and are not entitled to full faith and credit. No person can know what the communications were but the parties themselves between whom they are made; and a judicial investigation into those communications, which are of themselves a violation of law, would inspire a desire not only to avoid their penal consequences, but to maintain the character of good citizens, by making it appear that they had no improper influence upon the mind of the juror in the trial of the case. Testimony derived from such contaminated sources would be entitled to but little credence, and certainly could not form a reliable basis for the intelligent action of a court in a case involving the momentous

issues of life and death. The great difficulty in determining what communications were made, and what effect they may have had upon the minds of the jurors, is sufficient, in our opinion, to condemn the practice.

And we think that the purity and integrity of this mode of trial can be preserved only by a close adherence to the common law rule, which requires that the jury shall be kept together and not allowed to separate from their fellows without being attended by the bailiff or officer having them in charge until the case is tried or otherwise disposed of, and they are regularly discharged by the court. By permitting the jury to go at large, as in the case now under consideration, they were liable to be tampered with and to imbibe prejudices against the accused. It is immaterial whether improper influences have been exerted or not; the only safety is in keeping the jury free from the liability to such influences. McQuillen v. The State, 8 S. & M., 596. The door to tampering must be closed, and the only effectual way to do it is to set aside verdicts when found under the circumstances above indicated.

But in all other cases of irregularity, in which it may be made to appear that the jury, during the trial, have been exposed to improper influence which *might* have affected the purity of their verdict, such exposure shall vitiate the verdict, unless it affirmatively appear that such influence failed to have any effect in procuring it.

In this case it is suggested by the counsel for the state that if there was any error in permitting the jury to separate, it was cured by the consent of the prisoner. We do not agree with counsel in this view of the law. We are of opinion that the court has no power to authorize the separation of the jury during the trial of a capital case, either with or without the consent of the prisoner, except in cases of great necessity; and if it be done, and the prisoner be found guilty, a new trial will be granted. The prisoner ought not to be asked to consent. Who dare refuse to consent, when the accommodation of those in whose hands are the issues of his life or death is involved in the question? He would have to calculate the chances of irritation from being annoyed by a refusal on the one hand, and of

tampering on the other. No consent of the prisoner, in the extremity of his need, ought to bind him. He may really be unwilling to permit the jury to separate, but may consent for fear that his refusal may prejudice the jury against him. Peiffer v. The Commonwealth, 15 Penn. State Rep., 468; The State v. Hornsby, 8 Rob., 554; The State v. Populus, 12 La. Ann. Rep., 710; The Commonwealth v. McCaul, 1 Virginia Cases, 271; Westley v. The State, 11 Humphrey, 502; Wiley v. The State, 1 Swann, 256; People v. Backus, 5 California, 272.*

For these reasons the judgment must be reversed, and the case remanded for a new trial.

Judge SIMRALL not sitting in this case.

RILEY *v.* STATE, 43 Miss. R., 397.

ILLICIT RETAILING OF INTOXICATING LIQUORS WITHOUT LICENSE.

The proprietor of a drug store is liable for the acts of his agents or clerks in the unlawful sale of intoxicating drinks, even though such sales be without his knowledge and against his express orders.

In an indictment against a druggist for illicit sale of intoxicating liquors, it is not necessary to allege the name of the person to whom sold.

On the trial of an indictment for illicit traffic in vinous or spirituous liquors, proof of an agreement to sell is not sufficient; there must be proof of an actual delivery of the liquors. There need not be proof of payment, because a sale on credit is as much a violation of law as a sale for cash.

Error to the circuit court of Scott county. WATTS, J.

The case is fully stated in the opinion of the court. The plaintiff in error assigned the following errors:

1. The court erred in overruling the motion of the plaintiff in error to quash the indictment.

* See also Wharton Am. Cr. Law, 3135; Com. v. McCall, 1 Va. Cases, 271; Overbee v. Com., 1 Rob., 756; Com. v. Roby, 12 Pick., 496; State v. Prescott, 7 N. H., 291; State v. Babcock, 1 Conn., 401; State v. Tigiman, 11 Iredell, 514; Hines v. State, 8 Humph., 597; McCann v. State, 9 S. & M., 465; Boles v. State, 13 ib., 397; Organ v. State, 26 Miss., 76; People v. Douglass, 4 Cowen, 26; Eastwood v. People, 3 Parker C. R., 25; Capron v. State, 20 Geo., 752; Cornelius v. State, 7 Eng., 782; Caleb v. State, 39 Miss., 721; Jumperts v. People, 21 Ills., 375; Coker v. State, 20 Ark., 54; Creek v. State, 24 Ind., 151; Reins v. People, 30 Ills., 256; Maher v. State, 8 Minn., 444; Madden v. State, 1 Kansas, 340.

2d. The court erred in granting the instructions asked for by the state.

3d. The court erred in refusing to grant the third instruction asked for by the plaintiff in error.

4th. The court erred in overruling the motion for a new trial.

W. B. Shelby, for plaintiff in error.

I will notice the errors assigned in their order. The first is, that the court erred in overruling the motion to quash the indictment. This motion is substantially as follows: That the "indictment is so vague and uncertain that it does not notify the defendant of the nature and cause of the accusation against him; because the indictment does not specify the person or persons to whom the defendant sold the spirituous liquors." The question raised by this motion is this: Must an indictment for retailing specify the name of the person or persons to whom the liquor was sold? This question certainly has never been decided by this court, and we are, therefore, compelled to rely on general principles, and the adjudication of the courts of other states, for its solution, and in the latter there is conflict. An indictment must be so plain and certain as to fully notify the accused of the "nature aud cause" of the accusation against him. And it has been decided by this court, in the case of Shabe Williams v. The State (not yet reported), that "it is necessary to specify on the face of the indictment the criminal nature and degree of the offense," and "also the particular facts and circumstances which render the defendant guilty of that offense," so "that the defendant's acquittal or conviction may inure to his subsequent protection," and to enable him to prepare for his defense in the particular case.

Now, it may be conceded that the indictment in this case does set out the nature and degree of the offense, but I contend that it does not notify him of the "facts and circumstances" which render him guilty of the offense. One of the circumstances of one of the indictments of the offense, which, if set out in the indictment, would certainly the better enable the defendant to prepare for his defense, is the specifying the name of the person to whom the liquor is sold. If his name is specific,

the defendant may produce him at the trial to show his innocence. No hardship is imposed upon the state by the adoption of this rule, for doubtless in almost all cases of this character the indictment is usually found upon the citation of the very person to whom the liquor was sold; and it is, therefore, an easy matter to so specify in the indictment. Since the decision of this court in Miazza v. The State, it is not necessary to specify the particular time at which the liquor was sold. Miazza v. The State, 36 M., 613. Now, if the time at which and the name of the person to whom the liquor is sold can be omitted, then I insist that all the facts and circumstances which render the defendant guilty, which tend to point out and designate with certainty the offense with which he is charged, are wanting, and that in consequence of such omission, he stands at great disadvantage in making his defense, and cannot use his subsequent conviction or acquittal for his protection. 2 Wharton Criminal Law, § 2443, 5th ed.; State v. Walker, 3 Harrington, 547; Com. v. Thurlow, 24 Pick., 374; Vecles v. State, 10 Missouri, 498; Caprity v. State, 1 Ind., 569.

The second error assigned is, that the court erred in granting the instructions for the state. The first instruction is erroneous in this, that it not only requires that the evidence that the liquor was intended for culinary or medicinal purposes, should satisfy the seller, but such evidence that a reasonable and prudent man would act upon. By reference to the Revised Code, art. 8, p. 199, it will be seen that evidence is only required to be such as would be satisfactory to the seller.

The third assignment of error is, that the court erred in refusing the third instruction asked for by defendant. By reference to the testimony, it will be seen that the liquor was sold by defendant's clerk, without his knowledge or consent, and in violation of positive instructions of defendant. The court, in refusing the third instruction, refused to charge the jury that the defendant was not criminally liable for the acts of his clerk or agent, done without his assent, and in violation of his instructions. We think the refusal of the court to grant this instruction was erroneous. See 2 Wharton Criminal Law, § 2436; Barnis v. State, 10 Conn., 398; Com. v. Putnam, 4 Gray, Mass.

The fourth assignment of error is the refusal of the court to grant the motion for a new trial. We respectfully refer the court to the testimony, and insist that it does not warrant the conviction.

Jasper Myers, late attorney general.

First. As to the sufficiency of the indictment. It is admitted that it is an open question whether or not the name of the party to whom the liquor was sold should appear in the indictment. That the language of the statute is substantially adhered to in the indictment, see Bishop on Criminal Procedure, § 374, vol. 1; ib., § 359. But counsel invoke that clause of the constitution of the state which secures the accused the right to be informed of "the nature and cause of the accusation against him." In this case, what is the "nature and cause of the accusation against the accused," or the "nature and degree of the offense?" In stating that the degree of the offense must be set out in the indictment, it is merely intended that those facts which are necessary to show, beyond possibility of mistake, what the degree of the offense is, should be set forth.

The mischief which the act was designed to remedy was the sale of vinous and spirituous liquors in small quantities. If the acts which constitute this mischief are clearly set forth, then the accused is thereby informed of the "nature and cause of the accusation against him." The degree of the offense is fixed by the statute. See the case of Murphy v. The State, 24 Miss., 595, 596. That was an indictment for trading with the slave. The court held that it was not necessary, in order to comply with that clause of the constitution, to specify the name of the slave, nor of the owner; but where the name of the slave and of the owner was omitted from the indictment, it was held that it was necessary to specify the article or commodity.

As to the particular facts and circumstances which render the defendant guilty of the offense, see Bishop on Criminal Procedure, § 274.

I contend that the particular facts necessary to render the defendant guilty of the offense, some of them, as, for instance,

"sale" "compounded of law and fact," are "specified on the face of the indictment."

As to the reasons cited to sustain the above rule, the defendant's acquittal or conviction may inure to his subsequent protection. See 1 Bishop, § 196.

The old practice was to have a number of different counts, either for the same offense or for different offenses; and Chitty observes, "It is even no objection, either upon demurrer or upon arrest of judgment, that separate offenses of the same nature are joined against the said defendant. 1 Chitty Criminal Law, 248 *et seq.* If evidence was offered and was applicable to any one of the counts, it would be applied to that count; and if one of the counts was sustained, it would be sufficient to sustain a conviction.

As to the second error assigned, viz., in giving the instructions for the state, I submit that there is no error. The evidence of the good faith of the purchaser must be such as to satisfy a prudent man of the fact, and of such a character that a prudent man would act on it. This is so, because the law presumes that every man has an ordinary amount of reason and prudence.

As to the third ground assigned as error, the instruction asked for is erroneous in this, that after laying down the principle that defendant is not criminally liable for acts of his clerk, contrary to his instructions, and without his knowledge or consent, is added, "and they must find the defendant not guilty." In addition to the sales by his clerk, the defendant himself sold liquor.

J. S. Morris, attorney general.

In an indictment for unlawfully selling ardent or spirituous liquors, it is unnecessary to aver to whom they were sold, or even the number of persons. See State v. Manger, 15 Vermont R., 190; People v. Adams, 17 Wend., 47; Com. v. Dove, 2 Virg. C., 25; Com. v. Thurlow, 24 Pick., 374; State v. Webster, 5 Halst., 293; Morrison v. Com., 7 Dana, 218; State v. Carter, 7 Humph., 158; Canady v. The People, 17 Ills., 158; State v. Purnell, 16 Ark., 506. And respecting the instructions given or refused by the court below, that they are in accordance

with the statute, Rev. Code, art. 9, p. 199, and in harmony with the uniform current of adjudications by this court. Whitton & Ford v. State, 37 Miss., 379; Haynie v. State, 32 Miss., 400.

TARBELL, J.:

At the July special term of the Scott county circuit court, for 1869, the plaintiff in error was indicted for a violation of the provisions of the Code regulating "the sale of vinous and spirituous liquors." At the October term of the same year the cause came on to be tried, when the defendant submitted a motion to quash the indictment, which being denied, the defendant excepted, and pleaded not guilty. The trial resulting in the conviction of the accused, a motion was made for a new trial, which was overruled, and the defendant excepted. The judgment of the court was that the defendant be fined fifty dollars and costs, and stand committed until paid. Having brought the case to this court, the plaintiff in error submitted the following "assignment of errors," viz:

1st. The court erred in overruling the motion of plaintiff in error to quash the indictment.

2d. The court erred in granting instructions asked for the state.

3d. The court erred in refusing third instruction asked by plaintiff in error, defendant in the court below.

4th. The court erred in overruling the motion for a new trial.

The following is the motion to quash:

Defendant moves the court to quash the indictment herein, because the same is so vague, uncertain and indefinite that it does not notify the defendant of the nature and cause of action against him.

1st. Because said indictment does not specify or name the person or persons to whom the defendant sold the spirituous liquor alleged in the indictment to have been sold by him.

The motion for a new trial was on the following grounds:

1st. Because the court erred in overruling defendant's motion to quash the indictment.

2d. Because the court erred in refusing instruction number three, asked for by defendant.

3d. Because the court erred in granting instructions asked by the state.

4th. Because the verdict is contrary to law and evidence.

The third instruction asked by defendant, and refused by the court, was in these words:

"That if they believe, from the evidence, that the defendant instructed his clerks not to sell liquor otherwise than in good faith for medicinal, culinary, and sacramental purposes, and said clerks did, without his knowledge and consent, violate said instructions, then the defendant is not criminally liable for such acts of his clerks, and they must find the defendant not guilty."

The following are the instructions asked by the state, and given by the court, to wit:

1st. That if the jury believe, from the evidence, that the defendant, J. L. Riley, or his agent, M. Edwards, being an apothecary, did sell spirituous liquors in any quantity less than one gallon, within two years next before finding this indictment, without requiring from the person who bought satisfactory evidence that it was for medicinal, sacramental, or culinary purposes, that the defendant, J. L. Riley, if he owned the liquors, or spirituous liquors, is guilty, and they will so find; and further, that the evidence so furnished must not only be satisfactory to the seller, but it must be such evidence that a reasonable and prudent man would act upon."

2d. In order to constitute a sale of liquors, if the liquors are delivered, and it is understood that they are to be paid for, it is not necessary that there should be actual payment of the money.

3d. That although one of the witnesses, Clack, may bear malice or enmity against Riley, yet the jury are to decide whether or not the law has been violated; and if there has been a violation of law, it will be no cause of acquittal that Clack may have presented the case to the grand jury because of his enmity.

Several witnesses were examined, whose testimony tended to show that defendant kept a tippling-shop; that he employed a clerk, who usually attended to the liquor trade; that the clerk

had positive instructions from Riley not to sell except in good faith for medicinal, culinary, or sacramental purposes. But it would seem, and the jury had a right to infer from the testimony before them, that the instructions to the clerk were in bad faith, or intended as a "subterfuge." The jury doubtless believed, and the evidence went to show, that liquor was sold, both by defendant and his clerk, by the bottle, without any questions as to its use; and that liquor was habitually drunk in his store by the glass, as a mere beverage, and not for medicinal purposes, and charged in account on the books of defendant, and settled thereon by the purchasers after an accumulation of drinks. It is clear, from an inspection of the record, of which the foregoing synopsis presents the material facts, that the only question to be considered by the court is, whether the indictment is fatally defective in omitting to state the name or names of the person or persons to whom the liquor was sold.

The fundamental test of an indictment is, that it shall set forth the "nature and cause of the accusation" against the defendant. Const. of Miss., art. 1, sec. 7.

It is true that indictments, like pleadings in civil cases, have in late years been greatly simplified; but whether in cases for violation of the law relative to "the sale of vinous and spirituous liquors" (Rev. Code, ch. 20, pp. 197 to 201), otherwise unobjectionable, would be, without designating the person or persons to whom the liquor is sold, a sufficient statement of the "nature and cause of the accusation," has not been distinctly presented to the courts of this state, so far as we are informed.

This point is, therefore, before the court of last resort, for the first time in Mississippi. General rules, however, applicable to indictments generally, founded upon statutes, have been stated by our predecessors, substantially in the language of authoritative authors. Several cases arising under the laws to suppress trade with slaves have also been considered, and though quoted, are not regarded as conclusive, because of the peculiarity of those statutes.

Boyd v. The State, 1 How., 163, involved several questions not bearing upon the case at bar; but in the course of the opinion, the court expressed the sentiment, believed to be correct in

theory and sound in practice, that "courts of justice are disposed to release the rigor of the ancient forms, when no injury can possibly result to the liabilities or rights of the accused." Ainsworth v. The State, 5 How., 242, was a case of *felony*; but in relation to indictments, the court held that they should "describe the offense in the substantial language of the statute." Citing Ch. Cr. L. and Starkie's Cr. Pleadings, the court further say: "It is, in general, necessary, not only to set forth on the record all the circumstances which make up the statutable definition of the offense, but also to pursue the precise and technical language in which they are expressed."

To the same effect are the cases of Scott v. The State, 31 Miss., 473; Anthony v. The State, 13 S. & M., 263; Sarah v. The State, 28 Miss., 267; Ike v. The State, 23 Miss., 525; Williams v. The State, 42 Miss., 328.

The case of Miller v. The State, 5 How., 250, was an indictment under the statute against retailing. There were three counts in the indictment. The first count charged defendant with selling in less quantities than one gallon, and also with suffering the liquor so sold to be drank on his premises. The second count charged the defendant with giving away liquor to his guests without charge therefor. The third count contained a general charge of a violation of the act, but specified no instance.

On error, the first count was held bad for duplicity and uncertainty; but the second count was held good. It does not appear that the guests were designated by name, or that objection was made on that ground. The defendant having been convicted, the verdict was sustained.

The case of Johnston v. The State, 7 S. & M., 58, was an indictment under the statute to suppress gaming, charging generally the playing of a game of cards, &c., without specifying the game. Mr. Franklin Smith, counsel for defendant, urged strenuously that the indictment did not identify the offense, and insisted that, "if the statute dispenses with all identification of the offense, it is unconstitutional." The court sustained the indictment and the statute, and affirmed the verdict of guilty.

The case of Noonan v. The State, 1 S. & M., 562, was an in-

dictment under section 5 of the act of 1842, for the regulation of the sale of vinous and spirituous liquors, &c. Though it alleged in general terms sale of *liquor* to a slave, &c., neither the *kind* of liquor sold, the name of the slave to whom sold, nor the name of the master or overseer, were given in the indictment. Counsel for defendant conceded the sufficiency of the indictment *under the act*, but urged that the statute was a violation of the constitutional guaranty that the accused shall be informed of the "nature and cause of the accusation," and of another provision of the constitution that no person can "be deprived of his life, liberty, or property, but by due course of law." The report of this case gives the arguments of counsel, Messrs. George Calhoun and John G. Ott, at length, and they are earnest and almost vehement appeals in behalf of personal rights, alleged to be imperiled by law, like the one upon which the indictment in that case was framed. The court sustained the constitutionality of the statute, saying, among other things, that the personal rights and privileges secured by the clauses of the constitution quoted were not infringed by the statute in question; that the constitution everywhere allows, and in some places exacts, the enactment of laws directly contravening the long-established rules of the common law; and when it enjoins that the rights of persons shall be "ascertained by law," and protected "by the common law," it intends to sanction only that species of legislation which shall in its assertion in criminal cases be equal, and not partial and particular; that "many of the rules of the common law are now vexatious, and have become unnecessary and unfitted to our occasions, and are properly repealed when they are found to obstruct the current of justice, or the interests of the whole people." * * * "The statute runs against several *mala prohibita*, which were unknown to the common law. The substance of the offense is the *selling* of vinous or spirituous liquors to a slave, without the master's permission, and not necessarily the selling of *a particular kind* of liquor to the slave of a particular individual. Every offense consists of the omission or commission of certain acts, under certain circumstances, and all which are its necessary ingredients, and must be stated. It certainly is not material to the proof of spirituous liquors to

define its particular kind by name, or to the proof of a person being a slave, to show his master's name. Nor is this a parallel case with those uncertain charges enumerated in being 'common thieves,' 'common evil-doers,' and such like. It cannot well be said that no one can well know how to defend himself from so general a charge, as it is deemed, when the statute provides it in the permit of the master of the slave to whom the article is sold, nor that he cannot plead the charge at bar, in abatement of a subsequent prosecution."

Murphy v. The State, 24 Miss., 590; and Same v. Same, 28 Miss., 637, were indictments under the act of March 6, 1850, "to suppress trade and barter with slaves." In the first named case the court, the very discriminating and learned Mr. Justice Yerger delivering the opinion, observes: "The indictment ought, in our opinion, to describe and identify the offense with such a degree of certainty that the accused and the court may know that the offense for which he is put upon trial is the same offense with that for which he stands indicted, in order that he may plead in bar a previous conviction or acquittal. An indictment which does not contain this degree of certainty does not communicate to the accused 'the nature and cause of the accusation' against him in the manner contemplated and designed by the bill of rights." * * * * * "We do not think it absolutely necessary to state in the indictment the name of the slave, or of his owner, &c. But it is necessary, where the name of the owner, employer, &c., is not given, that the article or commodity should be stated." * * * * "Of course, where the name of the owner, employer, &c., of the slave is given, there would not be any necessity to name the commodity, or on the trial to confine the state to the day named in the indictment, as the offense would thereby be sufficiently identified to enable the party to make his defense. In the present case the specific article sold is named in the indictment, and the court did not err, therefore, in refusing to quash the indictment or arrest the judgment."

In the second case, the counsel hurled against the statute upon which the indictment was based, an argument, which for invective, eloquent and patriotic denunciation, would have done

honor to the great Athenian orator of history. In fact, the rarest illustrations are culled by the counsel from literature, the classics, law and history, to prove the statute oppressive, dangerous to the liberty of the citizen, and unconstitutional. The court sustained the law, and affirmed the verdict of guilty.

The case of Haynie v. The State, 32 Miss., 400, was an indictment for selling liquor within five miles of the University of Mississippi, contrary to the law of February 28, 1848. Sec. 1 enacts that it shall not be lawful for any person to sell by retail, vinous or spirituous liquors in quantities less than five gallons, within five miles, &c. "*Provided, however*, Nothing herein shall be construed to prohibit the sale of vinous and spirituous liquors in less quantities from drug-stores for medicinal purposes." The following instruction given by the court below, was sustained on error as "unquestionably correct," by the High Court of Errors and Appeals, to wit:

"If the jury believe the defendant sold the liquor to Drigg, on his representation that it was for medicinal purposes, it devolves on the defendant to prove that the liquor was for medicinal purposes; and if he has failed to do this, the jury will find him guilty."

The case of McGuire v. The State, 37 Miss., 370, like that of Haynie v. State, just referred to, was an indictment under the law of February 28, 1848, for selling liquor, &c., within five miles of the State University. Defendants asked instructions, in substance, that "if the jury believe, from the evidence, that the defendant sold the liquor to the witness, *in good faith*, for medicinal purposes, then he is not guilty, although the jury may believe the witness imposed upon the defendant as to the object for which the liquor was in fact bought." Which were refused, and on writ of error, the refusal and verdict were sustained, though the then very accomplished attorney-general confessed error on another point; the court—opinion by the very able and learned Mr. Justice Handy—observing: "It is clear, from the evidence, that some of the liquor in this case was purchased for other than medicinal purposes; and hence the instructions which rely as a justification upon the belief of the defendant, founded on the statements of the purchaser, that

the liquor was for medicinal purposes, were properly refused. But in addition to this, it is quite apparent, from the testimony, that these representations of the purchaser were mere matters of form, and the manner in which they were made, clearly showed that they were understood not to show the real purpose of the purchase, and the defendant could not have been deceived as to its real purpose."

In the case of Miazza v. State, 36 Miss., 613, the indictment, which was for retailing without license, does not set forth the customers of the accused; but no objection to the omission was taken by counsel, and the point is not discussed by the court.

In the case of Rocco v. The State, 37 Miss., 367, the customers are set out—the indictment being for retailing, &c. The questions contested were mainly under pleas of former convictions.

In the case of Shabe Williams v. The State, 42 Miss., 328, Ch. J. Peyton, then associate justice, delivered an opinion, marked by his usual conciseness and precision. The rules laid down by him for drawing indictments, and his carefully condensed reasons therefor, are as follows, the indictment in that case being for felony: "It is necessary to specify on the face of the indictment the criminal nature and degree of the offense, which are conclusions of the law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offense, for the following reasons:

1st. In order to *identify* the charge, lest the grand jury should find a bill for one offense, and the defendant be put on trial for another, without any authority.

2d. That the defendant's conviction or acquittal may inure to his subsequent protection, should he again be questioned on the same grounds; the offense, therefore, should be defined by such circumstances as will, in such case, enable him to plead a previous conviction or acquittal of the same *offense*.

3d. To warrant the court in granting or refusing any particular right or indulgence which the defendant might claim as an incident to the nature of the case.

4th. To enable the defendant to prepare for his defense in the particular case; or, if he prefer, to submit to the court by

demurrer, whether facts alleged (supposing them to be true), so support the conclusion in law as to render it necessary for him to make an answer to the charge.

5th. Finally, to enable the court, looking at the record, after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment."

We have now briefly referred to most, if not all the cases in this state bearing directly or remotely upon the question under consideration, and we have found the uniform rule as to indictments for offenses created by statute to be, that the indictments in such cases shall pursue the precise and technical language of the statute. This is *especially* the rule, with limited exceptions, *even* as to *highly penal* offenses. If, therefore, the language of the statute is the proper guide in the *higher* grades of crime, it follows that as to *misdemeanors*, the ancient forms ought to be less rigorously adhered to; and, certainly, as to these, an indictment pursuing the language of the statute creating them ought to be sufficient.

There is another test, however, developed in the cases referred to, which cannot be overlooked either by this court or by the pleader, viz: that the indictment shall be sufficiently explicit to enable the defendant to plead it in the bar of another prosecution, *autrefois acquit* or *convict*.

This point has been discussed in several cases by our predecessors; and it is well settled that the plea may be sustained partly by the record and partly by parol, and that it need not necessarily be wholly sustained by the record, or, in the language of the court in the case of Noonan v. The State, 1 S. & M., 574:

"The evidence under a plea of *autrefois, acquit* or *convict*, is not exclusively of the record, but may be oral *to the extent required in the circumstances.*" In fact, it is not merely the right, but the duty of the party tendering this plea, to support it by proof *aliunde*, the record. On this subject, *vide* Rocco v. State, 37 Miss., 357, and numerous cases cited therein; State v. Smith, 22 Vt., 74; State v. Wentworth, 35 N. H., 444; Com. v. McAfee, 8 Dana, Ky. R., 28; 1 S. & M., 562; 33 Miss., 374; 30 ib., 613; 37 ib., 357.

Art. 8, Rev. Code, p. 198, reads thus: "It shall not be lawful for druggists, apothecaries, or physicians to sell any vinous or spirituous liquors in less quantity than one gallon, except for medicinal, sacramental, or culinary purposes only; and they shall in all cases require satisfactory evidence from the party offering to purchase, that the liquor is required for one of the purposes above stated; provided, that every druggist and apothecary, before he shall sell for the purposes aforesaid, shall make an affidavit and file the same in the office of the clerk of probate, that he will not sell such spirituous or vinous liquors for the purposes aforesaid without being himself fully satisfied from the evidence furnished him by the purchaser that the liquors are intended to be used for the purposes, and no other, above enumerated."

So much of Art. 9, p. 199, as bears upon this case, is as follows: * * * * "If any druggist, apothecary, or physician shall sell any vinous or spirituous liquor in a quantity less than one gallon, except for medicinal, sacramental, or culinary purposes, or shall permit the drinking of such liquors in his store, or upon his premises," * * * "or if any person shall directly, or by any subterfuge, violate any provision of this act," &c., &c.

The indictment in this case, omitting the formal parts, is as follows:

"That J. L. Riley, late of the county aforesaid, on the 18th day of July, A. D. 1868, with force and arms, in the county aforesaid, and within the jurisdiction of this court, being then and there a druggist, apothecary, or physician, and having a license as required by law to retail vinous and spirituous liquors in quantities less than one gallon for medicinal, sacramental, and culinary purposes, did then and there sell spirituous liquors in a quantity less than one gallon otherwise than in good faith, for medicinal, sacramental, or culinary purposes, contrary to the form of the statute," &c.

Upon careful analysis of the record, and a lengthy review of the principles laid down by our predecessors as to indictments upon statutes, we are conducted to the conclusion that for offenses under the laws regulating the sale of vinous and

spirituous liquors, the indictment is not defective if it fails to set forth the names of the persons to whom the liquors are sold.

Impelled by the earnest argument of counsel in behalf of the rights of citizens, and by an anxiety to determine this question with the rights of the community on the one hand, and of individuals on the other, constantly in view, we have given this case more consideration, if possible, than is usually bestowed upon cases apparently unimportant. We say *apparently* unimportant, but counsel have invested it with vast magnitude by involving the sacred question of personal rights. With the importance of these rights and the necessity of their protection, underlying our investigations, we are still of the opinion that an indictment for an offense of this kind omitting the names of the persons to whom the liquors are sold, otherwise unobjectionable, is in accordance with the practice and within the spirit of the criminal jurisprudence of Mississippi, as expressed in her Code and expounded by her most distinguished jurists. And hence, that the indictment in this case is not amenable to the objection interposed by counsel.

In consideration, however, of the question of personal rights which the counsel for the accused urge will be endangered by the rule sought to be enforced by the prosecution, a reference to authorities other than of our own state may serve to establish the future practice in Mississippi, in this respect, upon a permanent basis. From authors and courts of recognized authority, therefore, we quote a few general principles.

1st. It is a well-settled rule that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute; and if, in any case, the defendant insists upon a greater particularity, it is for him to show that from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule. But few exceptions to this rule are recognized. Wharton's Am. Cr. Law, vol. 1, sec. 364, and cases; Whiting v. State, 14 Conn., 487. This rule is more briefly stated in Romp v. The State, 3 Iowa, G. Green's R., 276: "When an offense is charged in the language of the statute, it is sufficient." So

in N. H.: "In indictments for misdemeanors, it is generally sufficient to describe the offense in the words of the statute." State v. Rust, 35 N. H., 4th Fogg., 438. In Georgia, the practice is as simple as the rule is briefly stated: "It is sufficient if the offense be stated in the indictment in the language of the Code." Hines v. The State, 26 Ga., 614. Archbold says, "It is better to pursue strictly the words of the statute."

2d. A sale is not constituted by mere agreement to sell; there must be a delivery of the liquor. But the payment need not actually be made; for a sale on credit is within the prohibition of selling, though the law would not enforce the payment. 1 Bishop on Cr. L., p. 610, sec. 1135, and cases; Banchor v. Warren, 33 N. H., 183; Pulse v. The State, 5 Humph., 108; Emerson v. Noble, 32 Me., 380; Com. v. Barnes, 8 Gray, 482; Mason v. Lathrop, 7 Gray, 354.

3d. The courts will not suffer a defendant to escape the charge for selling, by resorting to any artifice, when, in fact, a sale is made. 1 Bishop on Cr. L., p. 611, and cases; State v. Redden, 5 Harring. Del., 505; Com. v. Thayer, 8 Met., 525; Gloucester v. Bridgham, 28 Me., 60; Kober v. State of Ohio, 11 O. S., 444; Kimball v. People, 20 Ill., 348; State v. Hopkins, 4 Jones N. C., 305; State v. Wright, 4 Jones N. C., 305; Murphy v. State, 1 Ind., 336; State v. Kirkham, 1 Ire., 384; State v. Bell, 2 Jones N. C., 337.

4th. Whatever a man does through an agent or servant or clerk, whether he is himself absent or present, may be understood in law as done by himself; and he is therefore indictable in the same measure as if his own hand performed the act. 1 Bishop on Crim. Law, sec. 430–432–616–618–1001; 1 Bishop on Cr. L., p. 621, sec. 1155, and cases; Com. v. Park, 1 Gray, 555; Thompson v. State, 5 Humph., 138; Com. v. Major, 6 Dana, 293; Com. v. Nichols, 10 Met., 259; Schmidt v. The State, 14 Mo., 259; State v. Bowen, 31 Me., 520; State v. Stewart, 31 Me., 515; State v. Dow, 21 Vt., 484; Parker v. State, 4 Ohio State Rep., 563; Com. v. Park, 1 Gray, 544 (1854). According to the authorities, the servant, clerk, or agent is also responsible personally the same as if he violated the law on his own account or for his own profit. Bishop on Cr. L., p. 621,

sec. 1155, and cases; State v. Bugbee, 22 Vt., 32; State v. Haines, 35 N. H., 4 Fogg., 207.

5th. In N. Y., Vt., N. J., Ky., Va., Tenn., Ill., Ark., and other states, apparently North Carolina included, State v. Shaw, 2 Dev., 198, an indictment against a person for selling spirituous liquors by small measure, without a license, need not aver to whom they were sold, though in Missouri, Delaware, South Carolina, and perhaps some other states, it has been held that the name of the person to whom sold must be specified, if known. 2 Archbold's Cr. Pr. and Pl., p. 1004.

In Indiana, not only a given quantity, but the price for which the liquor is sold, must be averred, as well as the names of the persons to whom sales are made, or state that they are unknown. 16 Ind., 355; 2 Blackf., 289; 4 ib., 40.

The statutes of Massachusetts define two offenses, with different penalties; one against "common sellers," and the other against persons selling in a single instance, without license. In the first class of cases, the person to whom sales are made need not be averred; but in the second, the persons must be specified; yet in an indictment in that state for the sale of spirituous liquors, the court say, "the law does not require the conditions and stipulations, or the precise condition paid for the thing purchased," but that it "only requires a direct allegation of a sale of liquor, leaving the circumstances to be disclosed by the evidence offered to support the charge." Com. v. Thayer, 8 Met., 525 (1844); Com. v Kimball, 7 ib., 304 (1843); Com. v. Clark, 14 Gray, 367; Com. v Glumlow, 24 Pick., 374; Com. v. Hendric, 2 Gray, 503; Com. v Grey, 2 Gray, 501 (1854); 4 ib., 18 (1855); Com. v Odlin, 23 Pick., 275 (1839); Com. v. Conanth, 6 Gray, 482 (1856); Com. v Conanth, 14 ib., 374. Similar laws and rules prevail in Maine.

Although the point was not presented nor discussed, yet if we correctly interpret the case of Zumhoff v. The State, 4 G. Greene's Iowa R., 526, the courts of that state do not consider it at all necessary to set forth in an indictment for an illegal sale of liquor the names of the persons to whom the sale is made.

In Com. v. Baird, 4 Serg. & Rawle's Penn. R., 141, the in-

dictment charged that James Baird, with "force and arms," &c., without any license so to do, first had and obtained, according to law, and then and there, without such license, common and publicly, did sell and utter, and cause to be sold and uttered to *sundry persons*, divers quantities of rum, brandy, and whisky, and other spirituous liquors, by less measure than one pint, contrary to the form of the act of the assembly, &c., and "against the peace, dignity," &c. The court say: "This form of indictment having prevailed for eighty years; been adopted by successive attorney-generals; the provisions of several acts being nearly, if not altogether, in the same words, the court will not say that all the prosecutions during that long time are erroneous, for it is admitted that this has been the only form. A continued and contemporaneous practice under a statute, *in a matter merely formal*, ought not to be lightly disturbed."

In the case of Sharp v. The State, 17 Ga. R., 291, it is briefly stated that the accused "was put upon his trial under an indictment charging him with the offense of retailing without license." And further, that "counsel for defendant moved to *quash*, on the ground that it should have charged him with 'misdemeanor.' The court overruled the motion," and observe: "The indictment stated the offense in the terms and language of the Code, or so plainly that the nature of the offense might be easily understood by the jury; and *that is all the law requires*."

In the case of the State v. Rust, 4 Fogg., 35 N. H., 438, the indictment was for "the illegal sale of two glasses of intoxicating liquor, contrary to the act," etc. A motion to quash, on the ground that the charge was not made with sufficient certainty, nor so plainly and fully described as was required by the constitution and laws of the state, was overruled.

In the case of the State v. Wentworth, 35 N. H., 442, which was an indictment for selling liquor without license, the court say: "If the policy of the statute were directed to the prohibiting of such *contracts*, the selling which it punishes might properly be construed to mean the making a contract of sale; and under that construction, the indictment might be required, in describing the offense, to set forth the party who was in the law the purchaser, if it undertook to allege the person to whom the

sale was made." * * * "But it is clear that the object of the statute is not to prohibit the making of such sales as *contracts*, but to suppress the unlicensed selling." * * "The whole force of the statute is directed against the *act of selling*, without regard to the qualities or *incidents* of the act, as a contract."

In the case of Canady v. The People, 17 Ill., 15, the court say: "The only question is whether an indictment for selling whisky in a less quantity than one gallon, without legal license to keep a grocery, is substantially defective for want of the name of the purchaser, or an allegation that he was unknown. We think not. The general averment of an illegal sale is in this respect sufficient, and this we think warranted, not only by the authorities, but the good sense of requiring only substantial facts necessary to enable the defendant to know the charge and to prepare his defense.

"The rule is abundantly sustained by the American decisions, as collected, Wharton's Cr. L., 815, though a contrary rule is adopted in some of the states. * * * * *

"These great niceties and strictness in pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge, or make preparation for his defense, for want of greater certainty or particularity in the charge. Beyond this, it tends more to the evasion than to the investigation of the charge, and becomes rather a means of escaping punishment for crime than of defense against the accusation."

In the case of the State v. Ladd, Swann's Tenn. R., vol. 2, p. 226, the court held that, "In the description of offenses created by statute, or such as are defined, and the punishment of them enlarged by statute, the safest and preferable mode is, to set forth the crime in the words of the statute; as the only effect of too much particularity in the description, except so far as is necessary for the end of a proper defense, by a substantial description of the essentials of the crime imputed, is to facilitate the escape of offenders from the just punishment of their crimes, and should not be favored."

Carruthers, J., delivering the opinion, remarked: "In times

past, the adherence to strict and unnecessary technicalities to rescue criminals, has been a reproach to the administration of justice, brought the law into contempt, and encouraged crime." And he asks, "Shall we go any further, then, in shielding offenders, when they have, as in this case, upon a fair trial, been pronounced guilty by a jury, by opening another avenue to them for escape, upon what must be regarded as a technicality?"

In the case of the People v. Adams, 17 Wend., 475, Ch. J. Nelson, a pure man and an able judge, in the earlier, if not in the better days of the New York bench, in a brief, yet comprehensive opinion, filling only a single page of the reports, yet embracing all the law on the subject, settles, beyond all controversy, the material point under consideration, as follows: "It is to be remarked that the offense upon the statute consists in *the act of selling* the spirituous liquors without the license; and therefore the designation of the persons to whom sold is in no way material to constitute it. The question is simply one of pleading, whether certainty to a common intent requires the names of the persons to be given to whom the liquor was sold. The precedents seem to be all the other way. Our statutes on this subject appear to correspond substantially with the English acts of parliament, and were undoubtedly taken from them, forbidding the sale of distilled spirituous liquors, or strong water, as will be seen from a collection of them in 2 Burns' Justice, 185, *and onward*. 4 Wentworth, 504, contains the form of information upon these statutes, for selling without license, in which the mere *act of retailing* the liquor without license is averred. The persons to whom it was sold are not mentioned, or in any way referred to.

"The same remark is applicable to an information and complaint before the justices for selling ale without license. 1 Burns, 23–25. There is a precedent in 2 Chitt. Cr. Law, 434, for selling ale or beer on Sundays, in which the sale is charged as made to divers idle and ill-disposed persons, whose names to the jurors aforesaid are yet unknown. Here, though the persons are mentioned as unknown, yet, from the manner in which it is stated, it is, I think, to be inferred that the names were not

deemed material, as in the precedents, when they are so considered, it is indicated by the form. In 4 Went., 525, a precedent is given for selling hard soap in a shape different from that required by the statute of 24 Geo. III, c. 48, § 14, in which the names of the persons are not mentioned, or in any way referred to. The case is strictly analogous to the one under consideration, so far as respects the questions involved. The precedents are clearly with the pleader in this case, and, upon a question the decision of which depends so much on the opinion of the courts as to what amounts to certainty to a common intent, these afford perhaps as safe a guide as can be found."

The general rule, already repeated in a variety of forms, is still differently expressed in 2 Burr., 1036, viz: "It is enough for the prosecutor to bring the case within the general purview of the statute upon which the indictment is founded, if that statute has general prohibitory words in it; for when an indictment is brought upon a statute which has general prohibitory words in it, it is sufficient to charge the offense generally in the words of the statute."

Sir Matthew Hale, whose fame as an enlightened, humane, and Christian judge, has become the property of the bench and bar of the civilized world, observes in 2 P. C., 193, "that in favor of life, great strictness has been at all times required in point of indictments; and the truth is, that it has grown to a blemish and inconvenience in the law and the administration thereof. More offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offenses, escape by these unseemly niceties, to the reproach of the law, to the shame of the government and to the encouragement of villainy, and to the dishonor of God; and it were very fit, that by some law, this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal, without some timely remedy."

That the illegal traffic in, and immoderate use of intoxicating liquors as a beverage, are evils of great magnitude, every impartial man will admit. Acts in violation of the statute on the

subject, are committed in secret, frequently at night, and generally in the absence of the owners of the liquor, by a servant or clerk, in hypocritical disregard of pretended instructions. The history of the legislation on this subject and of criminal jurisprudence, furnish unmistakable evidence of the difficulty encountered in the detection and punishment of offenders of this sort. The impunity with which the illegal traffic is carried on, not less than its ruinous consequences, forbids that a construction shall obtain which, instead of advancing the objects of law and order, would narrow the means of detection and consequent suppression of the evils complained of.

Bishop on Cr. L., sec. 1128, well remarks: "Whoever takes the trouble to read the old English statutes on this subject, learns from recitation of facts therein made, that the enforcement of this class of laws was already difficult. And all who understand the doings of offenders and of courts of the present time, know that the same facts exist now.

"The question of the constitutionality of the enactments has been put forward, in this country, as an obstruction in their way; the question of their expediency has also been urged against them; and the question of their intrinsic rightfulness has entered largely into the matter."

And he might have truthfully added, that there is no law which is as resolutely resisted by the utmost ingenuity of the human mind and by the ablest legal talent, as the statutes regulating the traffic in intoxicating liquor. In considering a recent statute of Michigan, the supreme court of that state observed, in regard to that statute: "It assumes the traffic is hazardous to the morals and to the best interests of society, and, therefore, only grants immunities from fines which are denounced against offenders upon condition of providing adequate security for compensation to those who may suffer from an unbridled and iniquitous exercise of the right." 3 Mich., 314.

Finally, we are of the opinion that the indictment in this case, so far as it omits to set forth the persons to whom the liquor was sold, is not only justified by precedent, but is in accordance with the strictest principles of justice to all parties.

The character of the offense and the object of the law would justify the most rigid rules, but fortunately the conclusion at which we have arrived, neither violates nor endangers personal rights. The indictment in this case pursues the precise language of the statute; it presents the issue fairly, and is commendable for discarding technicalities, which, having long since ceased to serve any useful purpose, cannot be otherwise than mischievous, although honored monuments in the progress of the jurisprudence of the world.

Let the judgment of the court below be affirmed.

PITTS *v.* STATE, 43 Miss. R., 472.

HOMICIDE.

In cases of felonious homicide, the *corpus delicti* consists of two fundamental and necessary facts: First, the death; and secondly, the existence of criminal agency as its cause.

The death must be proved by direct testimony, or by presumptive evidence of the strongest kind, and the criminal agency may then be established by presumptive reasoning upon all the facts and circumstances of the case.

When the dead body or remains have been discovered and identified, and the immediate cause of death remains unknown, the sworn observations and opinions of physicians, surgeons, chemists, and other scientific persons who have examined the body or remains, are often of the greatest value as testimony explaining the means of death.

Facts ascertained by reason of a confession may be considered in establishing the *corpus delicti;* but a confession not made in open court, or before the examining magistrate, but to an individual, uncorroborated by circumstances, and without proof, *aliunde*, that a crime has been committed, will not justify conviction; but the *corpus delicti* must be proved independently of extra-judicial confessions, and beyond reasonable doubt; and without such proof of the *corpus delicti*, evidence of the confession is inadmissible at the trial. Stringfellow v. the State, 26 Miss. R., 157, cited and approved.

Where a person of generally good health dies suddenly, and the symptoms and appearances indicate narcotic poison of Jamestown weed or *stramonium*, but are similar also to symptoms common to disease of the heart, or congestion of the brain or stomach, and the testimony and opinions of several physicians who examined the stomach and contents, without any analysis, is conflicting and leave it in doubt, with the probabilities equally balanced, whether the deceased died of poison or of disease—these facts, though accompanied by proof of a confession of the accused that he had administered Jamestown weed, are not sufficient to warrant conviction.

Circumstantial evidence should be acted upon with great caution, especially where the public anxiety for the detection of a great crime creates an unusual tendency to exaggerate facts and draw rash inferences.

Error to the Copiah circuit court. McNAIR, J.

The facts are sufficiently stated in the opinion of the court, except the testimony of the witnesses relating to the confessions of the prisoner.

William Kennedy, a witness for the state, testified that he was a prisoner in jail, in the same room with the prisoner John Pitts, but in a different cage. Heard and saw Mr. Geo. Magee, Mr. Joseph Magee, Mr. Zachary, and several others, talking to the prisoner. Saw two of the deputy-sheriffs there—Mr. Brady and Mr. Cochran. The prisoner denied that he poisoned the deceased James Magee, or had anything to do with his death. After they went away the prisoner laid down and seemed to be asleep. He commenced groaning in his sleep, and I said to him, "Halloa, old fellow! what's the matter?" and he answered that Patsy Allen was down stairs, there, telling on him, and making it out that she had nothing to do with it, when she was as much to blame as he was; and that he told him that James Magee was too intimate with his wife; that he was going to shoot him, and Patsy Allen told him not to do it; that he would be hung; that she could tell him how to do it, and what to give him, and if he would give it to her she would give it to James Magee; and that he got Jamestown weed and beat it up and gave it to Patsy Allen, and that she told him afterward that she had given it to him by putting it in the molasses." This statement was made voluntarily on the part of the prisoner. After he made this statement, he said if I would call the white people, he would tell them all about it. I called them, and Mr. Magee came up.

Mr. Joseph Magee being sworn, testified, among other things, "The prisoner confessed to me in jail that he gave it to Patsy Allen to give to James Magee; that one Sugar Bill Allen, a freedman, told him how to prepare it; did not know where Sugar Bill Allen was; when he heard from him he was in Madison county."

This was a voluntary statement on the part of the prisoner, made after he had confessed to Wm. Kennedy.

The following errors are assigned on the part of the plaintiff in error:

1st. The court below erred in overruling the motion to quash the special *venire facias* on the causes assigned and the testimony in support thereof.

2d. And it was also error because the record does not show that the assessor delivered a list of the names of all the persons in said Copiah county, qualified to serve as jurors, to the clerk of the circuit court of said county, nor that said clerk transcribed the same in a book kept for that purpose, as the law requires.

3d. And because the record does not show that the special *venire facias* was drawn from "jury-box No. 1," out of which the regular jury for each term of said circuit court of said Copiah county is required to be drawn, according to the statute in such cases made and provided.

4th. And also, because the record does not show that the names on the slips of paper in the pretended jury-box, from which the pretended drawing of the special *venire facias* was had, were, or had been, transcribed in a book kept for that purpose, by the clerk of said circuit court, from any list delivered to him by the assessor of said county.

5th. And because the record does not show that the list of names or any list of names of persons delivered to said clerk by said assessor included or embraced all persons of the county qualified to serve as jurors, without regard to race, color, or previous condition in life, according to law and the act of Congress in such cases made and provided.

6th. There is manifest error in the record, because it does not show that the indictment was returned into open court by the foreman in the presence of at least twelve of the grand jurors.

7th. Because the court below erred in not sustaining the motion for a new trial.

8th. And it was also error to pronounce judgment when the record shows no severance or disposition of Patsy Allen.

9th. It was error to pronounce judgment when the *corpus delicti* was not proved.

10th. And that in the proceedings, record, ruling on motions,

and in rendering judgment thereon, there are many and manifest errors besides those specified.

S. J. Morehead, for plaintiff in error.

It is insisted for the plaintiff in error that the *corpus delicti* was not established in this case, and that unless it be established, there could be no valid conviction. The proposition in the case of Sam v. The State, 33 Miss., that the main fact to be established as the basis of the prosecution was, that the house had been burned, is not sustained by subsequent decisions, and if it were, it is submitted that it does not militate against the case at bar; because all houses are not burned, but all men die; and that, therefore, it is not sufficient to say in this case that the main fact to be established as the basis of the prosecution was that James Magee was dead. But it must be established that he came to his death *feloniously*. It does not appear that it has ever been expressly decided that the naked confession alone was sufficient to authorize a *jury to convict*. 26 Miss. R., 165, 166; 5 Halstead, N. J., 163–185; Haywood, 455–524; 1 Greenl. Ev., §§ 217–219, 220, and note 6; 222 and note 1. And that he came to his death feloniously must be established by testimony *independent* of confessions. Stringfellow v. The State, 26 Miss., 165, 266. And the evidence ought to be *strong* and *cogent*. 3 Greenl. Ev., last part of § 30; Rex v. Benditt, 4 B. & Ald., 123.

"The books furnish many deplorable instances of the conviction and execution of innocent persons, for the want of sufficiently certain proof of the *corpus delicti*." Wharton's Am. Crim. Law, 284, 285, 2d ed. The only testimony, independent of confessions, pretending to show the *corpus delicti*, was Dr. Peets', and that is too contradictory and confused to be considered either "clear or cogent." As the record shows, Dr. Peets found deceased in a comatose and sinking condition, and gave him five grains of quinine to arouse him. He testified that that was a small dose in such a case, and that thirty or forty grains would be a large dose. He also testified that the same symptoms would be present in diseases of the heart, and in congestions of the brain and stomach, as were present in deceased. He

further testified that there would be delirium and spasmodic affections from the effects of narcotic poison, but did not say that deceased had either; but on the contrary, Pomp Newell testified that deceased did not seem convulsed or delirious, and that he thought he was asleep. The testimony of all the physicians agrees in this, that the early effects of narcotic poison is a delirious or spasmodic state; and Dr. Hanslow testifies that when the dose is large, that state passes off sooner.

Now, if he ate but little, was in fine spirits, went to the party, was dancing the third set, and was taken suddenly in the midst of the dance and its excitement, in a crowded room, with a pine-knot fire large enough to light it, beyond all contradiction, he could not have had a large dose. It must have been small. According to Dr. Hanslow, the spasms and delirium must have been long in passing off, and according to the testimony of Dr. Peets, he must have had convulsions and been delirious, if poisoned with a narcotic poison. And thus the testimony of Pomp Newell, that he was not delirious or convulsed in any way, is corroborated. And it is submitted that this view of the testimony shows that he could not have been poisoned. Because, in either aspect of the testimony, that if the dose was small, the delirium or convulsions must have lasted long, or if large, it would have been quick, short, and decisive in passing off.

There seems to be no evidence in the record that the offense was committed within the county of Copiah, as alleged in the indictment. State v. Green, 23 Miss., 513; State v. Vaughn, 3 S. & M., 553.

We look, in the next place, into the confessions. All the circumstances, in the midst of which they were wrung from the defendant, ought to be considered. The status of the races was at the time great with uncertainty. Though the temper was not bad, yet the public mind was full of distrust and incredulity. An officer and a posse came upon the defendant, a very weak and ignorant negro, in a deep sleep, in the dead of night, aroused, arrested, and traveled him till midnight to Joseph Magee's; thence, next morning, to the court-house, where, as is usual on such arrivals, a large concourse of people ran together, surrounding him, questioning him, and following him, when he

is presently taken to jail, where he is told to tell the truth. Henry Cochran, a deputy sheriff, told him it would be better for him to tell the truth. And having just testified the same thing in Patsy Allen's case, and perceiving that that was not sufficient to convict (1 Greenl. Ev., p. 304, §§ 219, 220, and note 6, § 222), immediately added that he (defendant) could not go to heaven with a lie in his mouth. But the mischief was already done by the first remark. The impression had been made upon the very weak mind of the negro that it would be better for him to confess, guilty or not guilty; and laboring under a general uncertainty and distrust of mind, already uneasy and alarmed by the night arrest, the talk and whisperings of the party, the night march, the early morning march to the court-house, being suddenly surrounded by a large crowd, hurried off, in the midst of the crowd, to jail—in the midst of these new, unusual, and overawing circumstances, was utterly unfitted to make up a safe judgment as to what was best for him to do; was just in that state of overwhelmed feeling that would induce one so ignorant and weak to seize the suggestions of any one making them with apparent kindness. The inducements, once having a lodgment in the mind, continue. 2 Russ. Cr., 839–842; 32 Miss., 386; 36 Miss., 116. Under all the circumstances as shown by the testimony, it is submitted that the confession should not have gone to the jury, and that as they did, denials as well as admissions, they were not sufficient to authorize a conviction. 1 Greenl. Ev., § 214, and cases cited in note 2, on false confessions.

It is insisted that the motion in arrest of judgment ought to have been sustained. The record shows an arraignment at a former term, but is not sustained by any legal arraignment of any former term. The record only states that there was an arraignment, but does not set out the arraignment. 8 S. & M., 587–595. Independent of the bill of indictment, and outside of it, the record should show that defendant was indicted by a grand jury of lawful men of the county, duly elected, examined, empaneled, and sworn. The record should show that defendant was *continuously* present throughout the trial. It only shows that he was brought into court; it does not show that he was so

conditioned or located as that he could confront the state's witnesses, or see the jury, or was in their presence; nor whether he was brought in when the jury was, or remained in court during the trial. 8 S. & M., 722. The record should also show that the indictment was returned into open court in the presence of at least twelve of the grand jurors, by their foreman. Rev. Code, 614, art. 257. The record should show that such indictment was entered or marked "filed," and such entry dated and signed by the clerk. Same page and article of Code. It will not do to say that such entry made on the minutes would do, for the next article, 258, forbids it. The record comes short of all these requirements, and, therefore, the motion in arrest of judgment ought to have been sustained. Dyson v. The State, 26 Miss., 383.

The court cannot determine, in capital cases, when the special *venire* is being drawn, who shall be a juror and who shall not, of the names of those persons on the slips of paper drawn. The statute does not authorize it, as in drawing the petit jury. Rev. Code, 500, Art. 157, and Art. 295, p. 620. Nor could the court delegate the power to the sheriff; and yet Sheriff Lowe testifies that, under the direction of the court, he dropped, or threw aside, all such as *he knew* to be non-residents, school-teachers, or incompetent; and that he threw out the name of F. W. Fanning, because he was supposed not to be in the county; all transient persons (in his judgment); all names of persons drawn on the slips whom he did not know to be residents of said county. It is denied that any such power was conferred upon the courts. But if it had been conferred upon the court in capital cases, the court could not delegate it to the sheriff, to determine the competency or incompetency, residence or non-residence, of jurors as drawn from the box, whether they should, in his opinion, be set aside, or put upon a special *venire facias*, to try a man for his life.

It is insisted that there has been no drawing, but a taking or selecting of slips from the box, and that the names could be read before drawn, and is no drawing within the meaning of the statute.

the trial, evidence of the confession of the accused.[1] The State v. Laliger, 4 Minn., 368.

In the important case of Stringfellow v. The State, 26 Miss., 157 and 165, the authorities upon this subject have been reviewed at considerable length by the court, who came to the conclusion, after great deliberation, that the doctrine which holds that in capital felonies the prisoner's confession, when the *corpus delicti* is not proved by independent testimony, is insufficient for his conviction, best accords with the solid principles of reason, and the caution which should be applied in the admission and estimate of this species of evidence; and that the extra-judicial confession of a prisoner, without proof *aliunde* of the commission of a felony, was insufficient to warrant his conviction.

Greenleaf, in the 1st volume, section 217, of his very valuable treatise on evidence, says: "Whether *extrajudicial confessions*, uncorroborated by other proof of the *corpus delicti*, are of themselves sufficient to found a conviction of the prisoner, has recently been gravely doubted in England. But in the United States the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction, and this opinion best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and it seems to be countenanced by approved writers on this branch of the law." Wills, in his valuable treatise on circumstantial evidence, 39 Law Library, page 88, says: "It may be doubted whether justice and policy ever sanction conviction where there is no other proof of the *corpus delicti* than the uncorroborated confession of the party." And Wharton, in section 683 of the 1st volume of his criminal law, says: "In this country there is a growing unwillingness to rest convictions on confessions alone." In Illinois and New York it is held that a naked confession, unattended with circumstances, is not sufficient to sustain a conviction of the accused, unless such confession be judicial or in open court. Bergen v. The People, 17 Illinois, 427, and The People v. Rulloff, 3 Parker's Cr. R., 401.

[1] See authorities cited in note to Stringfellow's case, *supra*, where the question is thoroughly discussed, and all the important cases cited in note thereto.

We think the well-considered case above cited, of Stringfellow v. The State, announces the correct doctrine upon the subject of the extrajudicial confessions of the accused in capital felonies. We think the doctrine of that case, which holds that in capital felonies the prisoner's extrajudicial confession when the *corpus delicti* is not proved by independent testimony, is insufficient to warrant his conviction, is sustained by authority, and best accords with the principles of reason, justice, and policy.

In the case at bar, the jury must have founded their verdict upon the confessions of the accused; for independently of those confessions there was no evidence to establish the existence of any criminal agency of the accused in the production of the death of the deceased. Dr. Peets, the only witness who testified that the deceased came to his death by poison, does not implicate the accused in the supposed poisoning of the deceased, nor is there any testimony in the record, *aliunde* his confessions, that tends to show that the accused had any agency in procuring the death of the deceased; and the prosecution having thus wholly failed to prove the *corpus delicti* by evidence other than the confessions, the verdict was unsupported by evidence, and the conviction was therefore wrong, and cannot be sustained.

But even suppose the *corpus delicti* had been established, by reference to the testimony it will appear that the prosecution failed to make out such a case as would justify the conviction of the accused.

Dr. Peets, who was the first physician called to the deceased, testified that he thought that he had congestion, either of the brain or stomach, and actually treated the case as one of congestion, but afterward came to the conclusion that he was poisoned, and died from the effects of the narcotic poison of the Jamestown weed or stramonium; stated that similar symptoms in the disease of the heart, and congestion of the brain or stomach, would be produced as he found in the case of the deceased, such as cold sweat, cold extremities, loss of the use of the limbs, headache, vomiting, and slow, full, and intermittent pulse. He further testified that a person in apparent good health is liable to attacks of disease of the heart and congestion of the brain or stomach as other persons; and that persons dancing in a warm

room, or from any uncommon exercise, are liable to such attacks. Many cases are reported in which persons were stricken suddenly, as above stated, when dancing; that dilation of the pupil of the eye would occur from congestion or disease of the heart as well as from the effects of narcotic poison. Witness could not state from his professional knowledge that the deceased came to his death from the effects of poison; thought, however, that he was poisoned; said that delirium and spasms would follow from the effects of narcotic poison, such as Jamestown weed or stramonium.

Pomp Newell testified, on the part of the state, that on the night before James Magee's death, he had a party and dancing at his house; saw the deceased dance two or three times; the room they danced in was a log-house, about sixteen by eighteen feet in size. The house was well lighted by a large pine-knot fire in the fire-place, and had no other light; there was a crowd in the room; that the deceased, after he was taken sick, did not seem convulsed or delirious in any way, but lay quiet on the bed as though he was asleep.

Dr. Hanslow testified that he was a practicing physician and regular graduate; had had a good deal of experience in the effects of poisons; had heard the testimony of Dr. Peets; states that persons having congestion of the stomach or brain, and in diseases of the heart where death ensues, would present similar symptoms to those described by Dr. Peets as exhibited by the deceased when he saw him in his last illness. Persons in apparent good health are liable to such attacks; persons dancing in a warm room, or having taken any unusual exercise, are liable to such attacks. Symptoms in congestion of the brain or stomach, would be cold sweat, cold extremities, loss of the use of limbs, slow, full, and intermittent pulse, and dilation of the pupil of the eye. Witness further testified, that from the testimony of Dr. Peets, and from all the testimony he had heard, he must say, from his professional knowledge, that it would have been impossible for him to have told what was the matter with the deceased, if he had been present with him. Dr. Purnell was next sworn, who testified substantially the same as Dr. Hanslow did.

Dr. Durr testified that he saw the body of the deceased some nine or ten days after it had been buried, when it was disinterred; that he opened the body and took out the stomach, but made no analysis of its contents; saw no evidence of poison in or about the body or stomach.

The symptoms produced by stramonium are intoxication, delirium, loss of sense, drowsiness, a sort of madness and fury, loss of memory, convulsions, paralysis of the limbs, cold sweats, and excessive thirst and trembling. 2 Beck's Medical Jurisprudence, 867. And Dr. Peets testifies that delirium and spasms would follow from the effects of narcotic poison, such as Jamestown weed or stramonium.

There is no evidence that the deceased had any of the prominent characteristic symptoms produced by stramonium, such as delirium, spasms and convulsions. He had, however, other symptoms, which are common to both congestion and narcotic poison. He had been dancing some time in a small, crowded room, lighted up by the hot fire produced by pine knots, which must necessarily have made the room quite warm and disagreeable. Under such circumstances, the physicians, Peets, Hanslow, and Purnell, agree that he might have been suddenly stricken down by congestion, for which he was treated by Peets, when first called in to attend him, and the symptoms of which disease the said physicians all agree that he had. And from all the evidence in the cause, we are led to infer that the disease first changed its character from congestion to poison, from the confessions of the accused, which from the atrocious nature of the crime of poison, was well calculated to excite in the public mind a feeling of just indignation, and a desire to ferret out and punish the guily agent. And in this connection, it may not be improper here to observe, that circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences. Not unfrequently a presumption is formed from circumstances which would not have been noticed as a ground of crimination but for the accusation itself, and in this instance, the confessions.

From the evidence of the medical witnesses, it was just as reasonable to suppose that the deceased came to his death from natural causes as from the effects of poison. As we have seen, he had all the symptoms, and may have died of congestion of the brain or stomach. And if so, the conviction, even upon this ground, is of more than doubtful propriety, and cannot be sustained upon any principle of humanity or of sound law. For it is the exclusion of every other reasonable hypothesis than that of the guilt of the accused, that invests mere circumstances with the force of proof.

For the reasons herein stated, the judgment of the court below must be reversed and the cause remanded.

DURRAH v. STATE, 44 Miss. R., 789.

HOMICIDE.

It is not a valid plea in abatement to an indictment for murder, to allege that the grand jury who found it were an illegal body because they were selected by an illegal board of supervisors; the acts of a board who are only *de facto* such being as valid as to third persons as those of a board *de jure*.

The empaneling of a grand jury is made by statute conclusive evidence of its qualifications and competency; and after it has been organized and sworn, no exceptions can be taken to its legality as a whole, or to the qualifications of its constituent members. Head v. The State, *supra*; and it is not error to refuse the defendant leave to withdraw his plea of not guilty, and to plead in abatement to the indictment, unless he presents matter in abatement, true in point of fact and valid in law.

It is no ground to quash a special *venire* in a criminal case, that one of the persons named in it was not a citizen of the United States; that would have been good cause of personal challenge, or of challenge to the fact, but it is not a defect in the writ.

The cause for which a special *venire* may be quashed must be either some fraudulent misconduct of the officer, or some manifest error in selecting, drawing, and summoning, in violation of law.

That a copy of the *venire* had not been served on the prisoner or his counsel a sufficient time before trial, would be no ground to quash the writ, although it might be ground for postponing the trial until he should have such time; and if he does not object for such a reason, but goes into trial, he will be taken to have waived the objection.

Instructions should have reference to the facts in evidence, and lay before the jury the law applicable thereto; and if the conviction is right on the evidence, and the jury could not have been misled by the instructions to the prisoner's prejudice, looking to the tenor of all the instructions, then the verdict ought not to be disturbed; and it is only when it appears by the whole record that injury has been done or may have been done the defendant, that the court will interfere to correct the error.

Error to the circuit court of Noxubee county. ORR, J.

The defendant was indicted by the grand jury of Noxubee county at the June term of the circuit court, 1870, for the murder of one Lewis Nichols. To this indictment he pleaded not guilty, at the August term, 1870. The special *venire facias* was returned on the 10th of August, and a copy thereof was delivered to counsel for defendant on the 8th. Defendant asked leave to withdraw the plea of "not guilty," and to file a plea in abatement, wherein he alleges that the grand jury were an illegal body, having been drawn and selected by a board of supervisors who were themselves an illegal body, not being residents of the respective beats from which they were appointed; and also for leave to file his motion to quash the special *venire*, because a copy of the same had not been delivered to him or to his counsel one entire day before the day of trial, and because one of the persons summoned on said *venire* was and now is a subject of the queen of Great Britain. These motions were overruled by the court, and the leave asked refused.

It appeared in evidence on the trial that the defendant and the deceased were both freedmen in the employment of Messrs. Kinkead and Gilmer, planters in Noxubee county; that the defendant was the body-servant of Gilmer, and the deceased, that of Kinkead. The defendant was seen early in the morning, apparently in a great passion, inquiring for the deceased at Kinkead's house, and was told that he was at Harrison's cabin; he then started for that house, and as some of the witnesses say, his manner as he passed them was exceedingly violent—was muttering curses, &c., and that on getting near Harrison's house, he pulled off his coat and threw it and his hat on the ground, and called for "Lewis," the deceased, "to come out there." That deceased came out, and defendant "pushed him," and said, "Lewis, this matter has got to be settled, or we have got to fight, damned quick." Some words passed between them, and they passed on back in direction of Kinkead's house, defendant leaving his coat and hat where he had thrown them on the ground, defendant bursting open the gate and passing out first; deceased stopped and shut the gate, defendant pushing him in a rude manner as he, deceased, did so. The two passed on about two hundred yards, when the defendant was seen to raise his

hand twice and let it fall towards deceased, when he, deceased, immediately halloed for help, and went in a bent position towards the house, and the defendant immediately turned back towards the cabins in a brisk walk. Witness went to the deceased where he had fallen, at the gate at Kinkead's house, and found him bleeding from a wound in his stomach, which appeared to have been made with a knife or dirk. Deceased died that evening.

The state then asked the court to give certain instructions to the jury, which were accordingly given, to the number of fifteen; but as only the last three were discussed on the argument, they alone are stated here, and are as follows:

13. "If the jury believe from the evidence that Green Durrah provoked a fight with the deceased, having previous malice against him, and in the fight used a deadly weapon, while the deceased was unarmed, and killed the deceased, he is guilty of murder. If, under these circumstances, he killed him without malice, but in the heat of passion, he is guilty of manslaughter."

14. That if the jury believe from the evidence that the defendant killed Lewis Nichols in a mutual combat, having fought with no unfair advantage, and did the killing with a dangerous and deadly weapon, the law is for the state.

15. That no definite time is required for the mind of the slayer to form such a design to take the life of the deceased as would make the killing murder. If the malicious intent was there at the time of the killing, the slayer is guilty of murder.

The charges asked on behalf of defendant to the number of seven were given by the court, but some of them were qualified by the court, to which qualifications the defendant excepted. They are as follows: "That to kill a human being with a premeditated design, the mind must have acted in regard to the killing before the killing was committed, and the mind must have settled down resolved and determined to kill and murder, and that the killing was done with such deliberation and formed design of so doing; and if the jury believe from the evidence that the defendant killed the deceased in a sudden quarrel, without a premeditated and formed design so to do, he is not guilty of murder [qualified], but may be guilty of manslaughter;

and the malice necessary to constitute murder may be formed but an instant before the killing.

To the subsequent charges for defendant the court added this qualification: "If the jury should believe from the evidence that the wife of the deceased, or the witness, Kinkead, gave the defendant a great provocation, or made the defendant exceedingly angry, and the defendant acted on such provocation, or anger, the killing is murder."

The jury found defendant guilty of murder in the first degree; and thereupon he moved for a new trial, which motion was overruled by the court, and exceptions taken. The defendant assigned the following errors:

First. The court erred in giving the charges asked by the state on the trial.

Second. The court erred in making and giving the qualifications to the charges asked for the defendant.

Third. The court erred in overruling the defendant's motion to set aside the verdict, and to grant a new trial.

Fourth. The court erred in overruling defendant's motion for leave to withdraw his plea of *not guilty*, and to file his plea in abatement.

Fifth. The court erred in refusing to quash the special *venire* for the reasons assigned in the motion.

Farnagin and *Rives*, for defendant,

Insisted that it was error to refuse leave to withdraw the plea of not guilty, and to file the plea of plea in abatement. The grand jury who found the indictment was an illegal body, because the board of supervisors who drew and selected it was itself an illegal body, being constituted of members who were non-residents of the beats for which they were respectively appointed.

Again, the court erred in refusing to quash the special *venire*. By Art. 294, Rev. Code, 629, a party indicted for a capital offense has a right to be furnished with a copy of the special *venire*, and list of *those* who have been summoned by virtue thereof, one entire day before the time set for trial. In this case defendant received only a copy of the special *venire*, and

of the list of names drawn *to be* summoned. Neither the letter nor spirit of the statute was complied with in this respect. Again, the defendant had a right to be tried by his "peers," citizens of the United States and of the state of Mississippi. Phillips, one of those *summoned*, was not his "peer"—not a citizen of the United States, nor of the state of Mississippi—but was a subject of the queen of Great Britain.

As to the charges in behalf of the state, from 2 to 7 inclusive, although they may state the simple propositions of law correctly, they are too abstract, and are not applicable to the facts and circumstances of this case; and are not calculated to guide the minds of the jury to a correct determination. The state had made but a single allegation against the defendant, that of murder; and to tell the jury that on a given state of facts "the law was for the state" was tantamount to telling them that the defendant was guilty of murder. And these objections apply with equal force to the qualification to the second charge for the state.

The general qualification at the conclusion of the seventh charge takes from the consideration of the jury everything done by the deceased himself, and what was reported to defendant by the wife of the deceased.

J. S. Morris, attorney general.

All the errors complained of are merely formal and technical. None of them relate to the merits. Without attempting to examine *in extenso* the first objection referred to in the argument in regard to the want of legal qualification in one of the members of the board of supervisors by which was selected the grand jury who presented the indictment, it will be sufficient upon that point to apply to the question raised the two statutory provisions regulating one of them, the official acts of *de facto* officers, and the other the organization of, and the time and mode of objecting to grand juries. Revised Code, p. 138, art. 194; ib., 499, art. 131. See also The State v. Borroum, 25 Miss., 203; and see also Rev. Code, p. 613, art. 250.

2. The accused is entitled to a list of the names of the jurors summoned on his special *venire facias*, to be delivered to him

as soon as that list shall be properly made out. If this copy thus required to be served is to be delayed till it be ascertained whether the officer shall find and summon all the persons whose names have been drawn, and then serve a copy of the list on those who have *been summoned*, such a practice will produce great and unnecessary delays. But be this as it may, there are, in the present case, two reasons why the defect, if it be one, cannot avail for the purpose of a reversal:—1st, Because all the provisions of the Code, and all other laws having relation to the mode of selecting, drawing, summoning, and empaneling all juries *are directory merely*, and shall be *deemed legal* after the jury shall have been empaneled and sworn. Rev. Code, 613, art. 250; and 2d, Because no exception was taken, or bill of exceptions tendered upon that particular point in the court below at the time the motion to quash the *venire facias* was overruled; and the objection cannot be made available by excepting to the judgment of the court overruling a motion for a new trial after a verdict of guilty. Hamilton v. The State, 35 Miss., 217. And the *venire facias* is no part of the record, unless made so by bill of exceptions. 37 Miss., 407; Haynie v. State, 32 Miss., 400; Brown v. State, ib., 434.

3. In respect to the exceptions taken to the judgment of the court, in giving and refusing instructions to the jury, and which are somewhat voluminous, it is sufficient, if on the whole they contain a substantially correct exposition of the legal rules and principles applicable to the case, which we submit that they do, when construed as a whole. Mask v. State, 36 Miss., 77; Oliver v. State, 39 Miss., 526; Josephine v. The State, ib., 613.

SIMRALL, J.:

The first error assigned, is the refusal of the court to permit the defendant to withdraw his plea of not guilty, and plead in abatement to the indictment. The matter in abatement, as set out in the plea tendered, was in substance, that the board of supervisors was illegally constituted, and the grand jury which preferred the indictment, having been selected by it, was an incompetent body. It might be a sufficient answer to say,

that the incumbents of the board were *de facto* officers discharging their functions, and that their acts as such, so far as third persons are affected, are as valid as if they were in office *de jure*. So that if the exception, stated in this proffered plea, was true in point of fact, it would not avail the plaintiff in error. But there is another and more conclusive answer. The empaneling of the grand jury is made by statute conclusive evidence of its qualifications and competency. After it has been embodied, sworn and charged, no exception by plea, or otherwise, can be taken to its legality as a whole, or to the qualifications of its constituent members. Jas. W. Head v. State, MS. opinion, No. 88. It would, therefore, not be error in the court to decline to allow the plea to be filed, when the matter of the plea would be of no benefit to the accused. When the case had progressed to that stage, that according to the practice the time for pleading dilatory pleas had passed, a party cannot expect, and ought not to ask, that his plea to the merits may be withdrawn, unless he presents matter in abatement true in point of fact, and valid in law. The court, in adjudging upon such an application, favorably to the accused, ought to be satisfied that the plea is sufficient and valid.

Ought the motion to quash the *venire facias* to have been sustained for the reasons stated—1st. That it was not delivered to the accused or his counsel an entire day before the trial? 2d. Because the jurors were not qualified, one of them being a subject of the kingdom of Great Britain, and not a citizen of the United States? The general policy of the jury laws is to discourage exceptions to the entire body of the *venire*, trusting to the examination on *voir dire* into the qualifications and the challenge for cause, and peremptorily, as ordinarily ample means to ensure the selection of an unbiased jury. Hence the statute makes all laws relating to drawing, summoning and empaneling juries directory merely. Art. 142 of the Circuit Court Law. Rev. Code, 501, forbids a challenge to the array except for fraud. Nor shall any *venire facias*, except a special *venire facias* in a criminal case, be quashed for any cause whatever. Array is the whole body of jurors summoned to attend a court, as they are arrayed or arranged on the panel.

Comyn Dig., Challenge B. *Venire facias juratores*, is the writ by which the sheriff causes to come from the body of his county a certain number of qualified citizens, who are to act as jurors in the court. Steph. Plea., 104. A challenge to the array is an irregular form of pleading, by which exception is made to all the jurors upon the *venire*, for some original defect in making the return thereto. 1 Chit. Crim. Law, 537. It must relate to some default or partiality in arranging the panel. Coke Litt., 156, A. The special *venire* was returnable on the 15th day of August, and a copy was delivered to the counsel of the accused on the 8th day of the month, so that one entire day did elapse between the service of the copy and the trial. Shafer v. State, 1 How. 242.

2d. It is no ground for quashing the *venire*, that one of the persons named in it was not a citizen of the United States. That would have been a good cause of personal challenge. It would be a challenge to the polls, and not a defect in the writ. The sheriff was bound to execute the writ according to its command; no discretion is entrusted to him to strike out, or substitute names, or to omit service, because in his judgment particular persons are incompetent jurors. The statute is silent as to the causes for which the *venire facias* may be quashed; it must be either for some misconduct in the officer, which would be fraudulent, or it must be founded on some manifest error committed in selecting, drawing, or summoning the jurors, by not pursuing the law. It is not pretended that there was error in the selection, drawing or summoning of the jurors, nor is partiality or corruption imputed to the officer. If the *venire* had not been served on the defendant in proper time, that would have been good reason to postpone the trial until the accused had the time allowed by law to examine and scrutinize the panel. But it would not be reason for quashing the writ if it were otherwise unobjectionable. As said by the court in Loper v. State, 3 How., 432, "The statute requires (service of copy of *venire*), to enable the prisoner to prepare his defense, and his challenge to the jurors." If he does not object to a trial for this reason, and asks an enlargement of time, he will

be taken to waive the objection. The return of the sheriff is conclusive, unless contradicted. Woodsides v. State, 2 How., 655; and Shaffer v. State, 1 How, 247.

The instructions given to the jury should have reference to the special state of facts in evidence, with a view to lay before them the law applicable to those facts. The doctrine was announced in Wesley v. State, 37 Miss. Rep., 351, that if the conviction is right on the evidence, and the jury could not have been misled by the court to the defendant's prejudice, looking to the tenor of all the instructions, the judgment ought to have been affirmed. The language of the court is: "It is not for every error committed by the circuit courts, in granting or refusing to charge the jury, that this court will reverse. It is only after an examination of the whole record, and when it appears that the party complaining has either been injured, or may have been injured, that this court will interpose and correct the error." We should be very slow and reluctant to disturb the verdict, if the law was correctly expounded to the jury in reference to the main and material facts developed in the evidence, although there may have been error on some point, collateral, and not touching the material and vital merits of the case. Error is predicated of all the instructions given at the instance of the prosecution, but in the argument objection is only taken to the last three. To have in the mind the facts to which they point, it is proper to sum up the leading and undisputed circumstances immediately preceding and attending the killing. The accused, early in the morning, displayed in the yard, and near the dwelling-house of Kinkead, a boisterous, angry humor, directed towards the deceased; most probably excited by some communication recently made to him by a woman. He immediately started in pursuit of deceased, and found him in one of the houses at the quarter. On sight, he, in an angry manner, accosts him with the declaration that this must be stopped, or there must be a fight. The parties walk off some short distance, when the accused stabbed the deceased, from which he shortly after died.

The 13th charge states to the jury, as law, that if the accused

had malice against the deceased, and provoked a fight, and used a deadly weapon, while the deceased was unarmed, and killed the deceased, it is murder. There is no evidence of any violence, or demonstration of violence, by the deceased, at or just preceding the stabbing. The thrust with the dirk-knife was the first and only blow given. There is not the shadow of pretense in the evidence that excuse existed for the use of a deadly weapon. There may have been, and perhaps was, a willingness, on the part of deceased, to go out and fight on equal terms; that is, without arms, for he had none. The jury were warranted in inferring that a resolution had been formed to take life before the fatal blow was struck, and that the stabbing was in pursuance of such purpose. Under the facts in evidence, it matters not whether the accused was in the habit of carrying the dirk-knife, the implement of death, or whether he prepared himself with it for the special occasion. He was the aggressive party. He sought out his adversary, and invited him to the conflict. He employed his weapon on the first onslaught, when in no danger of harm to life or limb; and from the circumstances of its use, the law implies an intent to kill, with malice prepense, because there was neither excuse nor justification. If in sudden provocation parties begin a conflict on equal terms, and when one party is sore pressed and overcome, and at the moment his life is endangered, he may be excused in seizing any means within his reach to ward off the impending danger. But this is only in sudden quarrel and fight, where there is no malice, but momentary passion is the exciting cause. If, however, the one who uses the deadly weapon has that advantage over his enemy, towards whom he has a grudge, or entertains malice, and brings on the fight with the intent to use it to slay his adversary, then it is murder. The 14th charge, as a general proposition, is too broad. It ought to have been accompanied with a statement of the conditions or circumstances which make a killing with a deadly weapon, in mutual combat, criminal, either as murder or manslaughter; but those conditions are so fully stated in the previous instructions, that the jury could not have been misled. The last charge correctly expounds the law on the subject of

malice prepense, or "the deliberate design," in order to constitute a homicide murder.

Wherefore the judgment is affirmed.

CADY v. THE STATE, 44 Miss. R., 333.

MURDER.

The rule as to the admission of confessions as evidence is, that they must be voluntary and free; not induced by the expectation of any advantage held out or promised, nor extorted to escape harm or injury, present and imminent, or threatened. Confessions must not proceed from a mind influenced to make them by the hope of a reward or benefit offered, or by the fear of injury or punishment threatened. Some extraneous pressure in the one direction or the other must be proved, in order to show that the confessions are not voluntary. Whether the confessions in a particular case ought or ought not to be received in evidence, depends very much on the special circumstances of that case.

Where the confessions have been induced by a promise or by a threat, similar admissions subsequently made will be presumed to have been made under the same motive, unless all the facts accompanying it remove such presumption, and create the belief that such motive had ceased to have influence on the mind. East P. C., vol. 2, 658; Roscoe's Cr. Ev., 30; Peter v. The State, 4 S. & M., 37.

Anything reasonably tending to hold out the hope or promise of reward or benefit for confession; or tending to create a fear of punishment or injury for the failure to confess, is, in law, an unwarrantable inducement to confess. But an appeal to the character or circumstances of the party, such as his family, his situation in life, the claims of justice of others whose rights or safety may be involved in his declaring the truth, to his responsibility to the Almighty for falsification or suppression of the truth; these might be inducements to make a confession, and yet such confessions would not *necessarily* be incompetent, the inducements not being illegal. 9 Miss., 711.

The relation of the accused to the party to whom the confession is made, has much to do with its competency as evidence. If made to one in authority, in response to an inducement offered, especially if the official personage be in a position likely to enable him to render his inducement effectual, it should be promptly rejected.

It appeared in evidence that, about 8 or 9 o'clock on the night of the homicide, the accused was at the house of the deceased; they were heard mutually quarreling, but they did not seem so angry as to excite apprehension on part of the witness. On next morning, at 8 or 9 o'clock, deceased was found dead, about 100 yards from her house, her skull being fractured, a good-sized stick lying near the body. Matthews arrested accused next morning; rode up to him in a field, about a mile from the place of the homicide, and told him some one had shot the deceased; he replied that she was not shot, but knocked on the head. At that time eight or ten freedmen came up from different directions and tied accused, and took him to where the body of deceased was, and where 100 or 150 freedmen had collected, and were much excited, and who insisted that accused should be hung; no threats or promises were made to extort confessions; accused's hands were tied, and a large crowd had collected around him. Accused said "he and deceased had a quarrel about some clothes, the deceased struck him, and he struck her one blow, not intending to kill her." *Held*, that such confession was properly admitted in evidence to the jury on the trial.

Error to the circuit court of Monroe county. BOONE, J.

Cady was indicted by the grand jury of Monroe county, at

the July term, 1870, for the murder of Minerva Ligon; and at the same term was tried and convicted of the crime as charged in the indictment.

The state introduced the witness Edmond Gilliam, a free man of color, who testified that about 8 o'clock on the night of the killing, he saw accused at house of deceased; was distant about ten yards; heard accused and deceased mutually quarreling; did not know the cause, but heard deceased order accused out of her house; left them quarreling, and went off to church; they did not seem so angry as to cause him to apprehend danger. About 8 or 9 o'clock next morning, body of deceased was found about 100 yards from her house. Signs on the ground indicated that deceased had been dragged from the house; some blood on the leaves at the fence; a good-sized stick was found near the body. When accused was brought to the place where the body was, witness and others tried to make him confess. When witness was about to state what accused had said, he was stopped by the court, and not permitted to proceed. On cross-examination, stated he was not the first to find the body; many others were there before him. Could not tell whether the signs on the ground were made by dragging body of deceased, or some other object.

J. M. Matthews, witness for the state. On the morning the body was found, arrested accused at work in a cornfield about a mile off. Rode up to him and told him some one had shot deceased; he replied, "She was not shot, but knocked on the head." At this time eight or ten freedmen came up from different directions, tied the accused, and took him to where the body was found. By the time they arrived there, 100 or 150 freedmen had collected, but were not all immediately about accused when he confessed. They were much excited, insisting that he should be hung; there was more feeling after than before the confession. Accused's hands were tied, and a large crowd collected around him. The accused objected to the statement of confessions being given in evidence, but the objections were overruled and witness allowed to proceed. Accused said he had given deceased some clothes to wash; they got into a quarrel about them; deceased struck accused, and accused struck

her one blow, not intending to kill her." Body of deceased was found in Monroe county, Miss., 30th August, 1869.

Cross-examined.—At time of arrest the freedmen were about thirty yards behind, generally around, and approaching like skirmishers. On being asked if in going with the accused from the place of arrest to where the body was anything was said, or threats made by any of the party to the prisoner, witness answered "No." But on further examination, said that something might have been said which he did not hear. Counsel for accused here proposed to prove that accused was weakminded and easily intimidated; but was not allowed by the court to do so, and counsel for the prisoner excepted.

The agreed statement of Dr. Tucker was then read on behalf of the state: "That the scar found on the head of deceased, on the morning after the killing, was a fracture of the skull, which produced the death." No other testimony was offered in the case.

The following instructions were asked and given for the state:

1. If the jury believe, from the testimony, that the deceased came to her death by violence, and the circumstances point to the accused as the guilty party, in such a manner as to exclude every other reasonable hypothesis as to the cause of her death, they will convict.

2. That the confessions of the accused may be taken in evidence against him, if connected with other circumstances.

3. That malice may be inferred from the acts of the accused.

4. That if the jury believe, from the testimony, that the accused did the killing, but did it in the heat of blood, or in mutual combat, they will find him guilty of manslaughter.

5. That a reasonable doubt is such a doubt as would reasonably arise from the testimony, and not a mere supposition or hypothesis.

The following instructions were asked for the accused:

1. If the jury believe, from the evidence, that the confessions of the accused were induced by threats, or promises or hope of reward held out to him, and from the evidence there is no fact or facts adduced sufficient to warrant a conviction, excepting

such threats or promises, they will find the defendant not guilty. Refused.

2. The jury are required to weigh the testimony, and may attach such credit to any witness as they may think proper; and unless they believe, from the testimony, that the defendant is guilty beyond all reasonable doubt, they will find him not guilty.

3. Every man is presumed to be innocent until he is proved beyond all reasonable doubt to be guilty, and the conviction in the mind of the jury to find the defendant guilty must be such as to exclude every reasonable hypothesis of innocence, and unless they have such conviction from the testimony, they will find the defendant not guilty.

4. In taking the confessions of the accused, the jury are bound to consider all the confessions together; and if the jury believe, from the evidence, that the defendant did not aim to kill, they cannot find the defendant guilty of murder.

A motion by defendant for a new trial was made on the ground that the verdict of the jury was contrary to the evidence, and contrary to the charges given by the court, but it was overruled by the court, and defendant excepted.

Mason M. Cummings, for the plaintiff in error.

It is indispensable to the admissions of evidence of confessions of crime, that they should be freely and voluntarily made. All authorities agree on this. Were it not so, the state might resort to torture in every case of doubt, so as to compel confessions, and so make out a case of guilt. In this case, aside from the pretended confessions of the accused, there was no testimony connecting him with the killing, except the isolated fact that twelve hours before it was known that Minerva was dead, accused was seen at her house, engaged in a *mutual quarrel* of so slight a character, that the witness who heard it went away to church while it was going on.

The case, therefore, depends almost entirely on the so-called confessions. The fact of deceased ordering the accused out of her house does not indicate a very heated state of blood between the parties, considering the usual etiquette of the colored race. Gilliam, the witness, of the same race, so regarded it. The

fact that the accused was there on that night, even if connected with other facts, is greatly weakened in its importance, inasmuch as the killing occurred on a plantation in a neighborhood where one hundred and fifty freedmen could be brought together in an hour by the discovery of the body, thus showing that it was quite possible that some one else might have done the deed. They prove that a good-sized stick was found near the body, but there is not a word of proof that the stick was the instrument of death. The prisoner did not say the deceased had been "knocked on the head" *with a stick*. There is no proof of blood on the stick, or that it belonged to the accused, or of indications that it had been recently in use. The witness was not the person who first found the body; there were many others at and about the spot before he went there. From Matthews' testimony, the idea at first was that deceased had been shot, but that position is abandoned by the state.

We insist that Matthews' testimony as to the supposed confessions ought to have been rejected. While some writers look upon confessions as the highest grade of evidence, others regard them as the weakest; especially, as in this case, where they are not strongly corroborated by other evidence. 4 Black. Com., p. 357 (cited in 2 Russell on Crimes, note *a*, p. 825), in speaking of confessions. Mr. Justice Foster and other able jurists hold the same doctrine. Note *a*, above cited. And we ask the court to examine critically the testimony of the witness Matthews touching the circumstances under which the so-called confessions were made. The testimony of this witness appears in a suspicious light, at best. He says no threats were made, nor promises, to extort a confession. To these assertions he swears positively; whereby the court is induced to permit him to tell what the accused said after he had been carried, tied and surrounded by an excited crowd, to the place of the killing. Upon cross-examination, however, and after his erroneous testimony had gone to the jury, he says that the crowd who were along with him, in taking the prisoner, *with his hands tied*, from the field to the place where the body was found, *might* have said something which he did not hear. Of course they *might*, and no doubt did, say something to him, as they were *greatly excited*,

and wanted to hang him right away. And Gilliam, the other witness for the state, also swears that "they had been trying to make him confess."

But we insist that if the court was right in admitting Matthews' testimony on this point, the verdict of the jury is not sustained by the evidence under the charges of the court. While it is the province of the jury to decide upon the weight of the testimony, yet this court will not sanction a verdict that shows upon its face that the jury mistook the crime, as made out by the evidence and the charges of the court. The most that can be made out of the pretended confessions of the accused (taking them all as true) is manslaughter. The confessions should have been taken *altogether*, and have been *believed* altogether, unless there was proof of facts conflicting with a portion of it. Gilliam says a quarrel was going on between the parties. The prisoner says deceased struck him, and that he struck her one blow, not intending to kill. But one wound is shown by the evidence, corroborating, thus far, the statement of the accused. Here is shown a heating of the blood sufficient to reduce the killing to manslaughter.

The court also erred in refusing to allow evidence to go to the jury as to the accused's state of mind and want of courage.

G. J. Buchanan, on same side.

There are two grounds of error relied on in this case: first, that the evidence of the confessions of the accused, under the circumstances, should not have been admitted by the court; secondly, there was not such a weight of testimony as to warrant the conviction. It is deemed necessary to notice particularly only the first ground of error.

Where confessions are made, such as are sufficient to take away the life of the accused, they generally proceed from fear of personal harm, or through hope of favor. State v. Long, 1 Haywood, 455; Whart. Am. Crim. L., 313. Where confessions tending to establish the guilt of the accused were made under the influence of personal violence, and through fear, they are not admissible in evidence. To be admissible, the confessions must be free and voluntary. 2 Russ. on Crimes, 826,

831; Serpentine v. The State, 1 How. Miss. Rep., 256; Whart. Am. Cr. L., 316.

The circumstances under which the arrest of the accused was made were such as were not only sufficient to greatly alarm, confuse, and intimidate him, but were such as to cause a reasonable apprehension that his life was about to be taken, or that great personal violence was impending over him.

The manner of his arrest by ten or twelve armed men, mounted and on foot; the binding of his hands; leading him a mile and a half, surrounded by excited men thus armed; and the efforts made by them to *make him confess*, very clearly negative the idea that the confessions were *free* and *voluntary*. The confessions, when detailed by one witness, are rejected by the court, but upon the statement of another one, are admitted. Why was this? There is nothing to show that one of these witnesses was more entitled to credence than the other.

J. S. Morris, attorney general.

There was no dispute or doubt in the court below, and there is none here, of the existence of the *corpus delicti* in all its elements, according to the rules of law laid down by this court in the recent case of Pitts v. The State, 43 Miss., 472. The only disputed question is, Was the accused, or was some other person, the guilty agent? Though no third party was present at the final tragedy, so as to testify as an eye-witness to all the particulars, the jury had before them enough of the facts—leading facts—proved by incontestible testimony, to remove all mystery or doubt, and justify a conviction of the accused.

1. The deceased was last seen alive in company with the accused, in her own house, at night, he quarreling with her upon some unknown subject, she vainly ordering him to leave the house, and he passively refusing to go.

2. She is found murdered on the next morning, at a distance of about one hundred yards from the house, her skull fractured from a blow on the head, a "good-sized stick" lying near the spot, and indications on the ground that the body had been dragged from the house.

3. The negative fact that in all the proof there was no cir-

cumstance or indication pointing to any person but the prisoner as the probable author of the deed.

4. The confession of the accused that he did the deed.

In this state of the facts, it were needless to attempt the discussion of improbable possibilities and conjectures unsupported by proofs. Possibilities or conjectures can avail nothing. There must be, in such cases, a doubt reasonably arising from the evidence. Cicely v. The State, 13 S. & M., 210; Bower v. The State, 41 Miss., 578; McCann v. The State, ib., 489; Algheri v. The State, 25 Miss., 584; Browning v. The State, 33 Miss., 48.

And as to the law regulating the admissions, and governing the effect of confessions, see Lynes v. The State, 36 Miss., 617; Peter v. The State, 4 S. & M., 31; Frank v. The State, 39 Miss., 705; Pitts v. The State, 43 Miss., 472; Sam v. The State, 33 Miss., 347. See also 1 Whart. Am. Cr. L., § 971.

SIMRALL, J.:

The plaintiff in error, James Cady, was tried and convicted in the circuit court of Monroe county, of the murder of Minerva Ligon, and removes his case into this court by writ of error, and complains for error—

First, that his confessions ought not to have been admitted in evidence against him; and, second, that the circuit court ought to have granted him a new trial, because the verdict was against the weight of the testimony, and against the instructions of the court. No exception was taken to any of the instructions; no objection is made to them in this court; and they are, therefore, not the subject of review. Barney v. Schirling, 40 Miss., 328.

The rule as to the confessions of the accused is, that they must be voluntary and free—not induced by the expectation of any advantage held out or promised, nor extorted to escape harm or injury, present and imminent, or threatened. As the rule is generally stated, the confessions must not proceed from a mind influenced to make them by the hope of a reward or benefit offered, or the fear of injury or punishment threatened. Some extraneous pressure in the one direction or the other must be proved in order to show that the confessions are not voluntary.

Whether the confessions ought or ought not to be received in evidence, depends very much on the circumstances of each particular case.

Where the confession has been induced by a promise or threat, a similar admission subsequently made will be presumed to have been made under the same motive; unless all the facts accompanying it removed the presumption, and created the belief that such motive had ceased to have influence on the mind. 2 East P. C., 658; Roscoe's Cr. Ev., 30; Peter v. The State, 4 S. & M., 37. Much depends upon the intelligence, or the want of it. The accused must realize the import of his act. It is not every idle threat, or extravagant, unreasonable promise of benefit, that takes from the confession its character of being free. If the threat or promise did not have the influence to induce it, it must be referred to other motives. And this, as we have observed, depends on the special circumstances of the case.

It was said in Frank v. The State, 39 Miss., 711, that an instruction in these words was much broader than the rule, to wit: "To warrant a conviction, confession must be free and voluntary, and made under no inducements whatever; and if any inducements were held out, confessions will not warrant a conviction." Remarking on this, the Chief Justice said: "Anything reasonably tending to hold out the hope or promise of reward or benefit for confession, or punishment or injury for the failure to confess, is, in law, an unwarrantable inducement to confess. An appeal to the character or circumstances of a party—to his family, or situation in life—to the claims of justice of others, whose safety or rights were involved in his declaring the truth—to his responsibility to the Almighty for falsification or suppression of the truth—*these* might be inducements to make a confession; yet such confessions would not necessarily be incompetent, for the inducement would not be illegal."

The test provided by law to be applied to confessions are to insure their truth, so that the verdict of the jury shall not, to any extent, rest on false testimony. The chief inquiry, as recognized by several of the courts, is, whether the inducement was calculated to make the testimony untrue. Rex v. Thomas, 7 C.

& P., 345; United States v. Nott, 1 McLean, 499; State v. Kirby, 1 Strob., 155.

The relation of the party (to whom the confession is made) to the accused, has much to do with its competency to go in evidence. If made to one in authority, in response to an inducement offered, especially if the official personage be in a position likely to give effect to his inducement, it would be promptly rejected. But if made under the influence of some collateral benefit or boon, no hope being held out, or fear excited, in respect of the particular charge, it is admissible. State v. Grant, 9 Shep., 171.

The record in this case does not show that any promise or threat was offered to the accused. The statement first made by him was in response to a question or remark by one of the witnesses, that Minerva had been shot. The fuller narration of the circumstances of the killing was made shortly after this, in the presence of a large number of persons, some of whom were present or near by when he was arrested, and addressed to the person to whom the first declaration was made. There was the usual excitement incident to a presence of a large number of individuals at the scene of a dreadful tragedy. It is not shown that up to, and and prior to, this confession, there had been such inducements held out as the law denounces. It was not error in the judge to allow the statement in evidence to be fully scrutinized by the jury, and such consideration given to it as it deserved.

The only question that can be raised on the refusal of the court to grant a new trial, is as to the sufficiency of the testimony. These are the leading facts in evidence: The accused and deceased were seen together about eight o'clock at night, engaged in a quarrel. The next morning, the body of the deceased is found about one hundred yards distant, with a bruise on the side of the head, a bludgeon lying by, and appearances as though she had been dragged on the ground. Her skull had been fractured by a blow, which produced death. These circumstances strongly point to the accused as the guilty agent; and accompanied by the confession that he inflicted the fatal blow, leave no reasonable doubt as to his agency in the deed.

In reviewing the decision of the circuit court refusing a new trial, we can only look to the grounds and reasons assigned in the motion; and we are precluded from the consideration of any other. Barney v. Schirling, *supra*.

The judgment of the circuit court is affirmed.

GATHINGS v. THE STATE, 44 Miss. R., 343.

RETAILING.

Several persons indicted jointly may be tried separately, at the option of the state; and in an indictment against two or more, where the charges are joint as well as several, one may be convicted and another acquitted by the jury, and judgment rendered accordingly. But where several persons are jointly indicted and convicted, the sentence must be several, and the imposition of a joint fine would be erroneous.

The 9th Art. of the Rev. Code, p. 199, is held to introduce a new rule of evidence in the trial of those indicted for violation of its provisions; and where partners are jointly indicted under that article, they may be convicted and punished, although one of them may have been wholly ignorant of the commission of the illegal act; each being responsible for the illegal act of his copartner, whether he participated in it or not.

There is no partnership in crime, and hence it is not necessary to allege in the indictment that several committed the offense as partners. So, under this statute, it is immaterial whether the liquor was sold by the defendant or by his servant or partner, with or without his knowledge or assent; having an interest in the liquor sold, he is indictable whether he assented to, or knew of the sale or not.

Error to Monroe circuit court. BRADFORD, J.

Plaintiff in error assigned the following errors:

1. The court erred in admitting the testimony of William McMillan to go to the jury.

2. The court erred in excluding that portion of the testimony of George C. Coleman elicited upon cross-examination by defendant.

3. The court erred in giving the charges asked for by the state.

4. The court erred in refusing charges asked for by the defendant.

5. The court erred in overruling motion of defendant for a new trial.

6. It was error to try the plaintiff in error before the cause was at issue, or was disposed of as to said Weaver and Burke, and error to try him separately.

George L. Potter, for plaintiff in error.

The judgment should be reversed, because—

1. The indictment was against them jointly—plaintiff, and Weaver and Burke—and there was no order for a separate trial, and no issue as to Weaver and Burke. It was error in such a state of case to try the plaintiff in error separately, and leave the cause still pending as to the other defendants.

2. The evidence does not justify the verdict. The indictment was for selling in *less* quantity than one gallon. The only proof of a sale is by McMillan, who bought "a bottle of whisky," &c., and the only proof of quantity is to be found in that one word, "bottle." The witness bought "a bottle of whisky," but in so buying did he purchase "less than one gallon?" There is no proof as to quantity. The size or capacity of a bottle cannot be *known*, but must be proved. Webster defines "a bottle" to be "a narrow-mouthed vessel for liquor," and thus that the word indicates form and not capacity.

3. It was error to exclude the testimony elicited on cross-examination of Coleman. The only act of selling spirits in the house was done by one Burke. It was not proved that Burke was a partner of Gathings; and the only evidence to show he had anything to do with the store is the statement of McMillan, who found Burke behind the counter, and bought the whisky and some other articles from him in the absence of the defendant. It was necessary to prove that Gathings was criminally responsible for this act of Burke. To do this, the state must show that Burke was clerk or agent of Gathings, and sold the liquor by his "consent or connivance," as stated in the first instruction for the state; or sold the whisky as a *part of the business* of his principal (Gathings), as stated in the second instruction. In view of such instructions, it is apparent how important was the excluded testimony. They sought to infer the consent or connivance of defendant in the sale of a single bottle of whisky, to raise a presumption of his "concurrence or consent," from the alleged fact that Burke made the sale *as a part of the business* in which he was employed by defendant. The excluded evidence showed that the store was a "dry goods house," and not a liquor store.

4. There was no evidence to prove the charge made in the indictment. The charge is a joint sale by *three*, and must be proved as laid; but is not proved. Nor is it shown that Gathings authorized or consented to the sale. A charge of crime cannot be sustained on such meagre proof.

5. The first charge for the state is erroneous. It asserts that defendant is guilty if the "liquor was sold in his house by his consent or connivance." It leaves out of view the important questions whether the liquor belonged to the defendant or his firm, and whether Burke sold for either of them. If Burke owned and sold the liquor on his own account, and not for defendant or his firm, the defendant would not be liable under this indictment, even though the sale was in his house, and with his consent; for it would not in any sense be a sale by the defendant.

6. The second charge, in the alternative form in which it was presented, is clearly erroneous.

7. The court erred in refusing the charge asked for the defendant. Defendant was charged with selling whisky without license; and surely he was not guilty if he "did not sell the whisky himself as charged," and did not authorize any one to make such sale for him.

8. For like reason it was error to refuse the other charge. Defendant was not guilty if his firm did not make sale, and if he did not make nor consent to the sale.

J. S. Morris, attorney general.

It is wholly immaterial whether Burke, who is proved to have sold the whisky in the defendant's store, was at the time a copartner or a mere employé. Commonwealth v. Nichol, 10 Metc. (Mass.), 259; Ib. v. Park, 1 Gray (Mass.), 553; Ib. v. Bayley, 7 Pick., 279; 1 Wharton's Cr. L., § 594. The statute under which this indictment proceeds, by express words applies to "any person who may *own or have any interest in*" the liquor sold. See Whitton v. The State, 37 Miss., 379.

As to whether the "bottle of whisky" proved to have been sold in defendant's store was "less than a gallon," it is merely a question of *fact*, to be decided by the jury, and the jury have

decided that it was. In so deciding, they doubtless gave to the phrase "a bottle of whisky," its "plain, natural, obvious, and ordinary signification;" and this was manifestly their duty under the law. See Bouvier's L. Dic., tit. "Construction;" Rev. Code of 1857, p. 643, art. 1.

TARBELL, J.:

At the February term of the Monroe county circuit court, 1868, C. M. Weaver, J. W. Gathings, and J. Burke were indicted for selling spirituous liquors in less quantities than one gallon without a license. Weaver and Gathings were arrested, but as to Burke the *capias* issued on the indictment was returned by the sheriff "not found." At the July term, 1870, of said court, the plaintiff in error, Gathings, was tried, convicted, and fined in the sum of one hundred dollars, besides costs.

Upon the trial, the following instructions were given to the jury by the court, on the part of the state: 1st. If the jury believe, from the testimony, that defendant was one of the firm of G. W. Gathings & Co., and that whisky in less quantity than one gallon was sold in his house, by his consent or connivance, they will convict.

2d. If the jury believe, from the testimony, that Burke was a clerk or agent of defendant, and sold whisky as such clerk or agent, as a part of the business of his principal, they may presume his concurrence and consent.

The following were given for the defendant:

1st. It devolves on the state to prove every material allegation in the indictment, to make the case out.

3d. The jury must find their verdict from the testimony adduced, and unless they believe from the evidence that the accused did the act charged, in person, they cannot find the accused guilty, unless they shall believe from the testimony that the act charged was committed by some one else, with the knowledge of the accused, or by the authority of the accused.

The following was refused:

2d. The defendant asks the court to charge the jury, that unless they believe from the testimony that Gathings, the defendant, and Weaver were partners in the sale of spirits, or

that the defendant sold the spirits himself, or consented to the sale, they will find the defendant not guilty.

The following testimony was objected to by the district attorney, to wit: A witness for the state, on cross-examination, testified that "the house or store of G. W. Gathings & Co. was a dry-goods house, including sugar, coffee, and some few other articles in the grocery line; that he was frequently about the house, and bought a pair of shoes in the house of G. W. Gathings, and never saw any whisky in or about the house," which answer was excluded by the court from the consideration of the jury, and the defendant excepted.

A motion for a new trial was made by the defendant, on the following grounds:

1st. Because the court erred in refusing charges asked by defendant, and in giving charges for the state.

2d. Because the jury found contrary to the law and the evidence; which motion was overruled, and the defendant excepted to this action of the court, and brought the case to this court for review, assigning for error the following:

1st. The court below erred in admitting the testimony of William McMillan to go to the jury.

2d. The court below erred in excluding from the jury that portion of the testimony of George C. Coleman elicited upon cross-examination.

3d. The court below erred in giving charges asked for by the state.

4th. The court below erred in refusing charges asked for by the defendant.

5th. The court below erred in overruling the motion of defendant for a new trial.

6th. It was error to try plaintiff in error before the cause was at issue, or disposed of as to said Weaver and Burke, and even to try him separately.

None of the causes of error are well taken. "When several persons are jointly indicted, they may be tried separately, at the option of the commonwealth to do so." Wharton's Am. Cr. Law, § 433; Curran's case, 7 Gratt., 619. In an indictment against two or more, it is generally true that the

charge is several as well as joint, so that if one is found guilty, judgment may be rendered against him, although one or more may be acquitted. To this rule there are exceptions, as in case of conspiracy or riot, to which the agency of two or more is essential; but violations of the license law not being within the reason of these exceptions, come under the general rule. Wharton's Am. Cr. Law, § 435; State v. Smith, 2 Iredell, 402; Com. v. Griffin, 3 Cushing, 523; State v. Lyerly, 7 Jones N. C., 159. Where several persons are jointly indicted and convicted, they should be sentenced severally, and the imposition of a joint fine is erroneous. Ib.; Waltzer v. The State, 3 Wis., 785; Straughan v. State, 16 Ark., 37; Cord v. Com., 14 B. Monroe, 386. *Vide*, also, State v. Gay, 10 Mo., 440; State v. Barry, 21 ib. (6 Bennett), 504.

The State v. Lyerly, 7 Iredell, 158, was an indictment against a man and woman for adultery. The man alone was put upon trial. To objection made in arrest of judgment, the court say: "It is well settled, that one, in the absence of his confederate, may be put upon trial, convicted and punished; the possibility that the confederate may be afterwards acquitted, will not arrest the execution of the law upon the one found guilty."

7 Dana, 229, was a joint indictment, and a general verdict of guilty against several for keeping a tippling house. The court said: "In prosecutions in behalf of the Commonwealth, each individual is responsible for his own individual act, and must answer to the commonwealth, personally, for his personal offense." If both are guilty, each is guilty, and each must make his fine to the commonwealth for the penalty fixed by law to the offense of which he has been found guilty.

But the record shows no objection to the separate trial of Gathings. For aught that appears, the defendant elected to be tried separately, and prior to any issue as to the other defendants, and before any disposition of the charges against them. In Curran's case, 7 Gratt., 619, the court say: "The presumption is, that defendant elected or assented to a separate trial prior to the disposal of the indictment against his co-defendant."

The testimony excluded from the jury by the court, was wholly immaterial and unimportant. It was entirely negative,

and could not have had the slightest weight with the jury. In fact it neither established nor negatived anything, except the utter ignorance of the witness as to the real issue in the trial.

The second instruction asked by defendant, was properly refused by the court. The remaining instructions submitted the case much more favorably for the defendant than the court was required to do. Art. 9, p. 199, Rev. Code, enacts that "if any person shall sell any vinous or spirituous liquor in any quantity less than one gallon, without a license therefor * * the person so offending (and also any person who may own or have any interest in any vinous or spirituous liquor sold contrary to this act) shall be liable to an indictment," &c. This statute is held, in Whitton & Ford v. The State, 37 Miss., 380, to introduce a new rule of evidence. Ford was not present at the sale in that case, and so far as the record showed, or the witness on the trial knew, he had no knowledge of the sale. The defendants, Whitton and Ford, were partners, jointly indicted and convicted. On error the verdict was sustained. The court say: "That Ford was responsible for the illegal act of his copartner, whether he participated in the act or not." Of this statute, the court in that case say: "Its object is as plain as its terms are clear. It was intended to reach a grievous evil in the community, by which persons of more or less responsibility engaged worthless or profligate persons in the business of retailing spirituous liquors, for the profit of their employers, in violation of the law of the land, resorting to all sorts of pretences, artifices and frauds, to conceal the violations of law, or the guilty participation of the principals in it. Persons who, by their means, set up and enable others to engage in a business which in its very nature is almost inseparable from violations of law, have no right to complain that the tribunals of justice are clothed with adequate powers to drag them from their concealment, and to visit upon them some slight degree of punishment for the misery and crime which they have been instrumental in inflicting upon the community within the range of their influence."

"There is no partnership in crime, and therefore it is not necessary to allege that several committed an offense as part-

ners." Gay v. The State, 10 Mo., 44. So it is immaterial under this statute whether the whisky was sold by the defendant, or by his servant or partner, with or without his knowledge or assent. Having an interest in the liquor sold, he is indictable, whether he assented to or knew of the sale or not. 37 Miss., 379; 1 Bishop Cr. L., §§ 430, 432, 616, 619, 1001, 1155; 1 Gray, 553; 5 Humph., 138; 6 Dana, 293; 14 Mo., 259; 31 Me., 520; 21 Ver., 484; 4 Ohio St., 563; Wharton Am. Crim. L., § 153.

It will be seen that under Art. 9, p. 199, Rev. Code, the instructions in this case are much more liberal to the defendant than he had a right to demand. Upon the issues presented by these instructions the jury have found the defendant guilty. The testimony as presented by the record is not very full, but these are cases peculiarly within the province of the jury. There were submitted to them, virtually, by the instructions, these questions: Was the defendant one of the firm of Gathings & Co.? Had he an interest in the whisky sold? Was the whisky in less quantities than one gallon sold in the house by consent? Was Burke a clerk or agent of Gathings & Co.? Did he sell the whisky as such agent or clerk as a part of the business of Gathings & Co. with the consent or connivance of defendant? To each and all of these questions the jury, on their oaths, have answered in the affirmative, and we are not disposed to disturb their finding. There is sufficient testimony to sustain their verdict.

Let the judgment be affirmed.

KLINE v. THE STATE, 44 Miss. R., 317.

VIOLATING SABBATH.

The general rule stated in several cases (5 How., 243; 13 S. & M., 263; 23 Miss., 525), that "Indictments on statutes must state all the circumstances which constitute the definition of the offense in the act; that they must pursue the precise technical language employed in the statute defining the offense," is a little too broad and general. Art. 7, Rev. Code, 573, supplies a rule of absolute force. "Merely formal and technical words shall not be deemed necessary (in indictments), so the offense be certainly and substantially described therein;" and the indictment would be good, although the "pre-

cise, technical language of the statute" be omitted, provided the offense is "certainly and substantially" described in other words of equivalent import.

Where the enacting clause of the statute describes the offense with certain exceptions, it is necessary to state all the circumstances that constitute the offense, and to negative the exceptions; but if the exceptions are contained in a separate clause of the statute, they may be omitted in the indictment, and the defendant must show that his case comes within them, to avail himself of their benefit. 2 Nott & McC., 365; 24 Maine, 232; 34 N. H., 422; 1 Leach, 102.

The indictment omitted to negative the exception by inserting the words, "not being a druggist or apothecary," as contained in the enacting clause of the statute; this negation being material, the statute does not authorize the court, at a subsequent term, to allow an amendment by inserting the words of the exception.

Error to Lowndes circuit court. ORR, J.

Matthews and *Anderson*, for plaintiff in error.

The indictment was found at the August term, 1869, and the subsequent proceedings were had at the July term, 1870. The 10th section of the bill of rights says: "The accused has a right to demand the nature and cause of the accusation" made against him by the state. This is not done by the indictment under provisions of the Rev. Code, art. 257, p. 614. By this act, amendments are restricted to such as may be made "by consent of the grand jury or of the court, during the term at which the bills may be found. If proposed after that term, they can only be made with the consent of the defendant, with permission of the court." By article 268, the authority to amend is restricted to formal defects alone. Articles 262 and 268 are not reconcilable with art. 257, except by holding that all amendments, whether of form or substance, should be made by the consent of the grand jury and of the court, during the term of the finding of the bill, or by consent of the defendant, and permission of the court, if proposed at a subsequent term. The formal defects specified in art. 262 can only be amended when there shall appear a "variance between the statement in the indictment and the evidence in proof thereof." A demurrer could not disclose such variance.

The grand jury is the appointed tribunal to communicate "the nature and cause of the accusation," and the court cannot add to or subtract from its specifications, except in strict accordance with art. 257; and articles 262 and 268 being in conflict with the bill of rights and art. 257, are of no force or effect. Newcomb v. The State, 37 Miss., 383. The indictment is

defective in charging the offense in alternative language. Murphy v. State, 24 Miss., 594; 1 Archbold, 298; 1 Baily South C. Rep., 144; 1 Bennett & Heard's Lead. Cr. Cases, 598. It is not a common law offense, 4 Iredell, 400; but is statutory, and should be clear and certain to every intent, pursuing the precise technical language of the act. Anthony v. The State, 13 S. & M., 264; Ike v. The State, 23 Miss., 527; Scott v. The State, 31 Miss., 473.

The exceptions contained in the statute are vital and substantial, and the indictment is defective in not expressly negativing them. Davis v. The State, 39 Ala., 523. And being thus matter of substance, no amendment could be made without the concurrence of the grand jury. McGuire v. The State, 35 Miss., 367. See also 1 Archbold's Crim. Prac., 287; Brittani v. The State, 5 Eng. Ark. Rep., 299; Davis v. The State, 39 Ala., 521; 1 Bennett & Heard's Lead. Crim. Cases, 250, 256, 259.

J. S. Morris, attorney general.

In an indictment for "disposing of, selling, or bartering wares, merchandise, goods, or chattels, on the Sabbath day," it is unnecessary to aver negatively that the defendant was not "a druggist or apothecary." That fact, if it exist, may be pleaded in avoidance or proved under the plea of "not guilty." 2 Hale P. C., 170, 171; Rex v. Pemberton, 2 Burr., 1037; Rex v. Bryan, 2 Strange, 1101; and authorities cited and approved in 1 Bishop's Crim. Procedure, § 375.

If there had been no leave asked or given to amend, or if, having been given, and the amendment made, the indictment still be imperfect in form, the benefit of the statute (Rev. Code, p. 616, art. 268) "is to be obtained," even here in the supreme court, by the courts overlooking the defect, and considering the amendment as being made. Rex v. Landaff, 2 Strange, 1011; Eakin v. Burger, 1 Sneed, 417; 1 Bishop Crim. Procedure, § 386.

As to the constitutionality of the statute above referred to, and which is relied upon as a cure of all mere formal defects in indictments and other criminal pleadings, I shall attempt no discussion. The terms used in the section extend to none but for-

mal defects; and to such only have they been applied in this case.

SIMRALL, J.:

Henry A. Cline was indicted for prosecuting secular business on Sunday, contrary to the statute, in this, "that on the 7th day of February, A. D. 1869, the same being Sunday, he did sell and dispose of goods and chattels, to wit, one can of oysters," &c. The defendant demurred on the ground that the indictment did not charge him with any offense. Art. 226, Rev. Code, p. 607, is as follows: No merchant, &c., or other person, except apothecaries and druggists, shall keep open store or dispose of any wares, &c., &c., on Sunday, or sell or barter the same. We find the general rule stated in several cases in this language: "Indictments on statutes must state all the circumstances which constitute the definition of the offense in the statute; they must pursue the precise technical language employed in the statute in defining the offense." Ainsworth v. The State, 5 How., 242; Anthony v. The State, 13 S. & M., 263; Ike v. The State, 23 Miss., 525; Williams v. The State, 44 Miss.

Perhaps the language of the courts is a little too broad and general as laying down an invariable rule. Art. 7, Rev. Code, p. 573, supplies a rule of absolute force: "Merely formal and technical words shall not be deemed necessary (in indictments), so the offense be certainly and substantially described therein." While it is the better and safer practice to follow approved precedents, and to adhere closely and precisely to the statutory description of offenses, nevertheless, the indictment would be good, "so the offense be certainly and substantially described therein," although there be absent from it words "merely formal and technical." The precise descriptive language of the statute need not be used, if other equivalent words are employed, which describe the offense "certainly and substantially."

This indictment is fatally defective in omitting to negative the exceptions contained in the statute. The rule is this: When the enacting clause of the statute describes the offense with certain exceptions, it is necessary to state all the circumstances that constitute the offense, and to negative the exceptions; but when

there are exceptions and provisos contained in separate clauses of the statute, they may be omitted; and the defendant must show that he comes within the exception or proviso. Reynolds v. The State, 2 Nott & McCord, 365; State v. Godfrey, 24 Maine, 232; State v. Glyn, 34 N. H., 422; Rex v. Palmer, 1 Leach, 102. A statute prohibited "all labor, business, or employment on Sunday, except works of necessity and charity." An indictment not negativing the exceptions was held to be bad. State v. Baker, 18 Ver. R., 195. So, where a statute prohibited the unlicensed sale of liquors, "except in corporate towns and cities," an indictment omitting to negative the exception was defective. Eakins v. The State, 13 Ga., 435; Howe v. The State, 10 Ind., 423.

Before a decision was made on the demurrer, the district attorney, with leave of the court, amended the indictment by inserting the words, "not being a druggist or apothecary," and another formal change, to which exceptions were taken. And that presents the question whether such change could be made. In McGuire v. The State, 35 Miss., 367, it was held to be error to change the indictment by correcting the Christian name of the accused, that being, as it was said, a material averment. That case occurred, however, before the adoption of the Revised Code of 1857. Art. 257, Rev. Code, p. 614: "The indictment may, with consent of the grand jury or of the court, be amended at any time during the term of court at which it was found, or afterwards, by the consent of the defendant, with permission of the court."

The indictment was found August 12th, 1869, and the amendment was made July 4th, 1870, which was a subsequent term. Art. 268, p. 617: After objection has been made by demurrer or motion to quash for any formal defect, the court may, if thought necessary, cause the indictment to be forthwith amended, and thereupon the trial shall forthwith proceed. If the objection taken to this indictment were merely "formal," the court has authority to order the amendment. But we have shown that the omission to negative the exception in the statute in favor of "druggists and apothecaries," was a vital defect, and power is not conferred on the court by this article to make other

than "formal" amendments. Article 268 refers to so many defects disclosed during the progress of the trial, which may be amended. This article applies to a variance between the allegations of the indictment and the testimony, and empowers the court to order amendments, so as to make the *allegata* correspond with the *probata*. The action of the circuit court cannot be brought within this provision.

There was error, therefore, in permitting the amendment, and the respondent, plaintiff in error, was improperly convicted. The judgment of the circuit court is reversed, the indictment quashed, and the cause remanded.

HEAD v. THE STATE, 44 Miss. R., 731.

HOMICIDE.

Art. 1, sec. 18, of the Constitution, and the act of 20th July, 1870, p. 88, abolish property qualification for jury service, and impose that duty on all citizens alike, who are not specially exempt: but the previous laws regulating the manner of selecting, summoning, and empaneling juries, and preferring objections thereto, still apply, unless abrogated by the Constitution itself.

By Art. 181, Rev. Code, 499, no objection by plea or otherwise shall be raised to empaneling the grand jury; but the empanelment shall be conclusive evidence of its competency and qualification; and after it is organized and charged it is too late to prefer objections. Although any person whose conduct may be the subject of inquiry or investigation, may challenge, or except to, the array for fraud.

By Art. 250, Rev. Code, 613, the courts are instructed to regard all the laws and statutes relating to the mode of selecting, summoning, and empaneling all juries as *directory* merely. After they are empaneled and sworn, though it be in an irregular or informal mode, they must be deemed legal and competent in both civil and criminal proceedings.

It is the duty of the court to superintend the selection of the jury, in order that a fair and unbiased jury may be had, and herein the court has a very large discretion; and the action of the circuit court in this behalf will not be subject to revision here, unless a violation of law, or a gross and injurious exercise of discretion, is shown. 43 Miss., 641.

The declarations of the defendant, made at the time of the shooting, as to the effect of his shot, are not "confessions in the technical sense," but connect themselves with the act, and form part of the *res gestæ*, and are clearly admissible in evidence.

To discredit a witness, it is competent to prove that he had made discordant statements at other times and places; but to re-establish his credibility, or to support what he has deposed on the trial, it is inadmissible to prove that he has made the same statements to third persons.

It is competent for the defendant to put to the state's witnesses the interrogatory, "What is your avocation?" and the state has no right to interpose objections to the answer; the witness may decline to answer where it would tend to criminate him or her, or bring them into disgrace or reproach; but this is the privilege of the witness, and of which it is the duty of the court to advise him.

The verdict of the jury will not be disturbed for any supposed error in the instructions, where it is manifestly right on the evidence; and it does not appear that the defendant was prejudiced by any one of the charges of the court. 37 Miss., 350. Nor is it error to refuse instructions asked, where the true principles of law applicable to the case are embraced in those already given.

The instruction that "it is incumbent on the state to prove the allegations in the indictment, or to make out its case. When a killing has been proved, the burden of proof changes, and it is then incumbent on the defendant to show excuse or justification, &c., and if he has failed to do this, the jury may find him guilty," is erroneous; the true proposition of law is, "if there be no excuse or justification for the homicide by the defendant, shown in the evidence adduced by the state, then he is guilty of murder, unless he has by his evidence proved excuse or justification.

The law presumes a man to intend the necessary consequences of his act; hence the use of a deadly weapon is *prima facie* evidence of malice, unless it be used to disable an adversary in the very act of making a murderous and malicious assault; and then the presumption of malice is overcome.

Every man is justified in protecting his life and limb at whatever hazard, but the danger must be present, imminent, and immediate; a mere fear or apprehension, arising from previous threats communicated, afford no excuse, unless at the time of the killing an effort was being made to put the threats in execution, and a real or apparent necessity existed at the time to slay in order to prevent it.

It was no error to refuse to instruct the jury "that if an armed person (not armed with reference to a controversy with the deceased) became involved in a difficulty with deceased, and took his life with such weapon, that malice cannot be inferred simply from the fact of the use of such weapon." The mere fact that the law permits a man to bear arms for self-defense, does not in the slightest degree diminish the responsibility for an improper use of them.

Error to Lauderdale circuit court. LEACHMAN, J.

At the August term, 1870, of the circuit court of Lauderdale county, the defendant, Head, was jointly indicted as principal, with one Smith as accessory, for the murder of Benjamin Doak. At the same term, defendant Head filed to said indictment his plea in abatement, alleging that the body preparing said indictment did not constitute a legal grand jury—1. Because they were not selected according to the requirements of the constitution and laws of the state. 2. Because they were selected from the freeholders and householders of said county, over twenty-one years of age, and under sixty; whereas, by law, no distinction shall be made among the citizens, &c., in drawing, selecting, or summoning, &c., and prayed that said indictment be quashed. This plea was overruled by the court.

At the same term motion was made to quash the special venire in the case, because a number of names were drawn on the same, but which were rejected and not placed in the panel, without any or a sufficient cause. This motion was overruled.

On the trial of the case, the state introduced A. C. Jackson as a witness, who says he lives in Meridian—was informed, on

the night of the 17th of April, that his step-son, Benjamin Doak, had been killed, about one and a half mile from Meridian, near Mrs. Parker's; sent some young men out with a wagon to bring in the body; recognized it as the body of said Doak; it was lifeless when brought in; a shot or ball had entered the body a short distance above the left nipple; had seen said Doak on the evening of that day in apparently good health.

W. M. Nix testified: Saw said Doak at 5 or 6 o'clock on the evening before his death; he informed witness that he was going to Mrs. Parker's to a party; saw defendant Head and one Wm. Smith, who said they were going to the same place; about 11 o'clock, same night, Jackson, step-father of Doak, requested witness and others to take a wagon and go out to Mrs. Parker's, and bring in the body of said Doak; went out, and found Doak's body fifty or sixty yards from the house, life being extinct; did not examine the body till it was brought to Meridian; found he had been shot about as stated by witness Jackson.

Wm. McDuffee testified: Went out with W. M. Nix; found the body, as stated by him; that between the body and Mrs. Parker's house the bushes were pretty thick, about four feet high; that one standing at the house could not see more of a man's body than from the breast upwards, where the body was found; deceased was in his shirt-sleeves; was about of same height as defendant Head; found no arms or weapons on or about deceased's person; his shirt was burnt around where the ball had entered; that the muzzle of the weapon must have been within three or four feet of the body when it was discharged; the night was pretty dark; had to light a candle to put the body in the wagon.

Mary Anderson testified: Was at the house of Mrs. Parker the night Doak was killed near there; said Doak came up about 7 o'clock; was quite drunk; said that Head had stolen his money, and that he (Doak) intended to kill him; saw no arms about him; that about an hour after this, defendant Head and one Wm. Smith came up; one Partee told defendant that Doak was in the house, and had threatened to take his life, whom he accused of stealing his money; and advised him not to go where Doak was; defendant replied, "I'll go and see Mr. Doak about

it;" saw in one hand a pistol, and in the other a pocket-knife; he went around to the other side of the house where Doak was; Doak said to defendant, "Let us take a walk;" and they went off from the house fifty or sixty yards, and stopped; heard Doak say to defendant, "You stole my money; you are a God d——d puke;" defendant said, "You are another;" Doak replied, "You are a God d——d liar;" about that time heard the report of a pistol, and saw the flash where they were standing; about ten minutes afterwards, heard Doak say to defendant Head, "You have arms, and I have none; you have stole my money; I don't want to live; kill me, d—n you;" that she then heard the report and saw the flash of another pistol and shot; saw Doak fall, and afterwards saw Head stooping over him; shortly afterwards saw defendant and William Smith going towards Meridian; that, about thirty yards from the house, a Mr. Opell approached Head and said, "Halt, Jimmy," and asked him if he had killed Doak; defendant replied, "I have shot red-hot—" (Objection was made to this answer, and overruled). Witness continued: "red-hot water out of him;" Wm. Smith was standing at the corner of the house when the first shot was fired, but went to the place of difficulty before the second was fired. On cross-examination by defendant's counsel, witness was asked, "What was her avocation?" The state objected to the question, and it was sustained by the court.

Josephine Partee testified: Was at the house of Mrs. Parker on night of the killing of Doak; he came there drunk, and said Head had stolen his money, and that he intended to kill him. The testimony of this witness being substantially the same as that of the preceding witness, the same questions on cross-examinations being asked and overruled.

Cynthia Parker testified: Is the daughter of Mrs. Parker, near whose house the killing occurred, &c. Her testimony is substantially the same as that of the two preceding witnesses. On cross-examination, to the question by counsel for defendant, "What is your avocation?" replied, "I make my living by sleeping with men; that is it—if you must know how I make my living;" "that Mollie Andrews and Joe Partee, who had been sworn as witnesses for the state, were her associates." Witness

was talking with Doak when Head came up to him; Doak had his coat off; saw no weapons about his person; he said to defendant, "Jim, you have gone back on me," and placed his arm around his neck, and asked him to take a walk; Head had a pistol in his hand.

Major Mimms testified: That as marshal of Enterprise, he had, in April last, arrested Head and Smith at that place, as suspicious persons, and put them in prison; they inquired for a Meridian newspaper; and on being handed the "Mercury," which contained an account of the killing of Doak, they read it, and seemed much excited over it; in obedience to a despatch from Meridian, he ironed and sent them to Marion jail, Lauderdale county.

Jennie Pullum corroborated substantially the testimony of Mollie Andrews and Josephine Partee, before sworn and examined.

The state next introduced said Wm. Smith, who testified that, on the night of the killing, he went with Head to Mrs. Parker's; Head said he had had a fuss with Doak, and if he said anything to him, he intended to kill him; some one told Head that Doak was there drunk, and had said defendant had stolen his money, and not to go round where Doak was; Head said, "I'll go around and see him; I reckon there will be no fuss;" defendant had, at the time, a pistol in his hand, and a knife in his belt; he and witness went round to Doak, who was very drunk; Doak said to defendant, "You have gone back on me," and asked defendant to take a walk with him; threw his arm around his neck, and they went off some fifty yards; witness followed behind; they sat down on a log; after some words a scuffle ensued, and a pistol was fired off; Head had a pistol in his hand during the scuffle; could not see what caused the pistol to fire off; the parties then separated; witness returned to where they were; they were two or three steps apart, quarreling; Doak said to defendant, "You have gone back on me; I don't care to live; kill me, d—n you; you are armed, and I have none; shoot and be d——d, if you want to;" defendant then fired his pistol at deceased, who then fell; defendant then said, "Die, you son of a b—h;" witness then went towards

the defendant, who said, "Don't approach me, or I'll shoot you;" witness then asked, "Have you killed Doak?" (Objections to this question were made and overruled.) Defendant replied, "Yes, I have shot the red-hot —— out of him;" witness and defendant then came to Meridian, and next day were arrested at Enterprise. Witness stated that he had been indicted jointly with Head, as accessory, but the case as to him had been *nolle prosequi*, in order to make a witness of him for the state.

Defendant then introduced as a witness one J. P. Allen, who testified that in May or June of this year (1870) he went into the prison at Marion, where defendant and William Smith were confined; that said Smith voluntarily stated to him that he was present at the killing of Doak, which took place in this manner:—Defendant and Doak took a walk into the bushes fifty or sixty yards from Mrs. Parker's house about nine or ten o'clock at night; that they got into a quarrel; that Doak tried in a scuffle that ensued to take Head's pistol from him; that in the scuffle, after Doak had got hold of Head's pistol, and while the same was in Doak's hand, it was accidentally discharged, and thus Doak shot himself; that Head, the defendant, was present at this statement, and said if Smith should be a witness for him he had no fears, if Smith would swear the truth. Smith further stated that he is defendant's brother-in-law, having married his sister.

The state then introduced as a witness one Willis Meadow, to show that Smith's evidence on the stand was consistent with what he had stated previous to the trial, and during the term of court. Defendant objected, but it was overruled by the court, and witness testified—that he was bailiff of the court; was present at an interview between the district attorney and Smith, at the present term. The district attorney asked Smith what his testimony would be, and to state the truth; that Smith said that if let alone he would swear the truth, and went on then, and his statement was about the same as he had testified to on the stand; and the district attorney then said if such was his testimony he would dismiss as to him. Defendant moved to exclude this testimony of Meadow from the jury, it being illegal. The motion was overruled by the court.

The court then gave the following instructions to the jury on behalf of the state:

2. The laws of the state define murder to be the killing of a human being without the authority of law, by any means or in any manner: 1st. When done with deliberate design to effect the death of the person killed, or of any human being; 2d. When done in the commission of an act imminently dangerous to others; and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual; 3d. When done without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, arson, or robbery, or in an attempt to commit such felonies.

3. While it is true that the defendant is entitled to the benefit of any reasonable doubt, it is also true that absolute, metaphysical, demonstrative certainty is never required; and that which amounts to mere probability or supposition, is not what is meant by reasonable doubt.

4. While it is true that every defendant is presumed to be innocent until the contrary appears, and that it is always incumbent on the state to make out its case, yet it is also true that when the state has made out a *prima facie* case—that is, as in this case, when the killing has been proved—the burden of proof changes, and it is then incumbent on the defendant to show sufficient excuse or justification for the killing; and if the defendant has failed to do this, the jury may find the defendant guilty as charged.

5. In order to justify the killing of a human being, there must be some overt act on the part of the person slain, indicating a present intention to kill the slayer, or to do him some great personal injury; and the danger of such design being accomplished must be imminent; that is to say, immediate, pressing, unavoidable, at the time of kiillng.

6. A bare fear that a man's life may be in danger from the violence of another, however well founded, and whatever may be the character of the man feared, unaccompanied by any overt act or demonstration indicating an intention immediately to kill such party, or to do him some great personal injury, will

not justify him in killing the other, by way of precaution, if there is no actual danger at the time of killing. Both the design to commit a felony, or to do such person some great personal injury, and the imminency of the danger of such design being carried into execution, must both exist, to justify the man then in fear of his life to kill; and this imminency of danger means danger at the time of the killing.

7. To make a homicide justifiable on the grounds of self-defense, the danger must be actual, present, and urgent; or the homicide must be committed in such circumstances as will afford reasonable ground to the party charged to apprehend a design to commit a felony, or to do him some great bodily harm, and that there is imminent danger of such design being accomplished; hence the mere fear, apprehension, or belief, however sincerely entertained by one man that another designs to take his life, will not excuse or justify the killing of the latter by the former.

8. When the danger is neither real nor urgent, to render a homicide justifiable or excusable within the meaning of the law, there must be at least some attempt to execute the apprehended design, or there must be reasonable ground to apprehend that such design will be accomplished, and the danger of execution imminent. A person may have a lively apprehension that his life is in danger, and believe that the apprehension is great and reasonable, but if he act upon them, and take the life of a human being, he does so at his peril. He is not the final judge of the reasonableness of his grounds of belief upon which he acted, but that is a question alone for the jury to determine.

9. Mere threats to take the life of a party, or to do him some great bodily harm, furnish no justification or excuse for the commission of a homicide, unless from the character of the party making such threats, and the circumstances under which they were made, they are calculated to put the party threatened in a just and well-grounded fear that he is in danger of his life or of some great bodily harm; and these to excuse or justify the homicide, the party making such threats must offer to put them in execution at the time of the killing.

10. Unless the jury believe, from the evidence, that the de-

fendant, at the time he killed the deceased, was in imminent danger of his life, or of some great bodily harm, or that he had a well-grounded apprehension of great danger to his life or limb, from some overt act on the part of the deceased, made at the time, and that he acted upon such fear at the moment of the killing, then he was not justified in taking the life of the deceased; and if the jury believe, from the evidence, that the defendant did not act at the moment he killed the deceased from such well-grounded fear of immediate and pressing danger of his life or limb, they may find him guilty as charged in the indictment.

11. Malice is an essential ingredient in the crime of murder, but malice may be either express or implied; and when there is no direct, positive and express proof of malice, it may yet in many cases be inferred from other circumstances in the case, and the jury may always infer malice from the deliberate use of a deadly weapon.

12. While malice is necessary to constitute the crime of murder, it yet matters not how short a time before the commission of the offense the malicious purpose was conceived; and the jury may look alone to the instrument used, and to the manner of using it, as evidence of the malicious intent, without any proof of previous malice.

13. The jury, in arriving at a verdict, should look to all the evidence in the case as a whole, and if they believe the material and substantial facts are sufficiently proved to establish the guilt of the defendant, they may make up their verdict upon the proof of such facts alone, and may wholly disregard any variance or contradiction in the testimony of the witnesses about matters which are not, in the opinion of the jury, material or necessary to the issue.

14. Manslaughter is defined by the laws of the state, to be the killing of a human being without malice, in the heat of passion, but in a cruel or unusual manner, without authority of law, and not in necessary self-defense; or the killing of another in the heat of passion, without malice, by the use of a dangerous weapon, without authority of law, and not in necessary self-defense.

15. The testimony of the witnesses introduced by the state not being impeached, and no evidence being offered by the defendant to impeach them, their evidence is competent for the state, and the jury cannot reject it, but should give it such weight as admissible evidence is entitled to under all the circumstances in which it was offered to the jury.

To all of which instructions the defendant objected, and excepted at the time.

The defendant then asked the court to give sundry instructions to the jury in his behalf, and which were accordingly given, to the number of fifteen; but the following were refused, to which action of the court, so refusing, the defendant then and there excepted:

1. The court is asked to instruct the jury, that under the evidence in this cause they are authorized to find the defendant "not guilty."

2. The jury should not convict the defendant upon the testimony of an accomplice, or accessory, alone, and without corroboration in some point material to the issue.

3. That by the laws of this state each man has the right to bear arms about his person, and if Head had on his person a deadly weapon, but had not armed himself for the purpose of using the same against Doak, or any other person, unless it became necessary in his self-defense, and being thus armed, he became involved in a difficulty with Doak, and took the life of Doak with such weapon, then malice cannot be inferred simply from the fact of his using such deadly weapon.

4. That it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of truth.

5. That mere circumstances will not authorize a conviction, unless they are so strong as to exclude every other hypothesis but that of the defendant's guilt.

6. That although the jury may be satisfied from the evidence that the prisoner killed the deceased, yet if the jury are satisfied from the evidence that the prisoner had reasonable grounds to apprehend a design on the part of the deceased to take the prisoner's life, or to do him some great bodily harm or great personal injury, and there was imminent danger of such design

being accomplished, then they must find the prisoner not guilty.

7. That the evidence must exclude every hypothesis except that of the guilt of the prisoner, and every conclusion from the evidence must be consistent with his guilt, and inconsistent with his innocence, or they must find the prisoner not guilty.

8. That it devolves upon the state to make out to the satisfaction of the jury, all the material allegations of the indictment; that mere preponderance of evidence in favor of the state will not authorize a conviction, unless such preponderance satisfies the jury, to a moral certainty, of the guilt of the prisoner; and if the jury are not satisfied from the evidence, to a moral certainty, of the truth of every material allegation in the indictment, they must find the prisoner not guilty.

9. That unless the evidence against the defendant should be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him, then the jury must find him not guilty.

10. That unless the evidence against the prisoner should be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense charged against him, they must find him not guilty.

11. That the jury must be satisfied from the evidence, beyond a reasonable doubt, that the prisoner killed the deceased, and the killing was done with malice aforethought; that is, that it was a premeditated killing, or they must find the prisoner not guilty.

Whereupon the jury returned the following verdict indorsed upon the instructions which had been given them, to wit: "We, the jury, find the defendant guilty of manslaughter in the first degree;" the verdict not being signed by any one as foreman of the jury, or by any member of the jury. A motion for a new trial was overruled, whereupon the prisoner was sentenced to the penitentiary for a term of seven years.

The defendant, Head, made the following assignment of errors:

1. The court below erred in not sustaining the plea filed to the legality of the grand jury which preferred the indictment,

and also in overruling the motion to quash the indictment for reasons set forth in the plea, and in the motion to quash.

2. The court erred in not sustaining the plea to the special *venire*.

3. The court erred in not quashing the special *venire*.

4. The court erred in its ruling on the plea to quash the special *venire*.

5. The court erred in refusing a continuance of the same.

6. The court erred in its ruling upon the admissibility of evidence.

7. The court erred in admitting the statements and confessions of the defendant without a proper predicate, showing they were free and voluntary.

8. The court erred in not permitting the defendant to prove what was the "vocation of certain witnesses, their business, how they made their living, and who their associates were."

9. The court erred in admitting the testimony of the witness Meadow.

10. The court erred in admitting illegal evidence to corroborate and sustain the evidence of the witness Smith.

11. The court erred in giving the several charges on the part of the state.

12. The court erred in refusing the several charges asked for by the defendant.

13. The court erred in pronouncing sentence on the verdict, or on what purports to be the verdict of the jury.

14. The court erred in pronouncing sentence upon the defendant without asking him if he had anything to say why sentence should not be pronounced.

15. The court erred in pronouncing sentence in the absence of the prisoner.

16. The court erred in refusing a new trial of the cause.

17. The court erred in allowing the state to object to the answers by witness Smith, on the ground that such answers would criminate him.

Coleman & Roberts, for plaintiff in error.

The court erred in overruling the plea in abatement to, and

the motion to quash the indictment. In support of this plea and this motion, see act Leg., July 20, 1870, p. 88; 1 Lead. Crim. Cases, 267, and cases there cited. The constitution of 1869 abrogated all qualifications previously existing as to grand and petit jurors. See also Barney v. The State, 32 Miss., 73. The record shows that the grand jury who found this indictment were not selected from the entire class of persons made eligible as such. Const., art. 1, sec. 13; act July 20, 1870, p. 88; McQuillen v. The State, 8 S. & M., 596, 597; Portis v. The State, 23 Miss., 580; Stokes et al. v. The State, 24 Miss., 623; Leathers v. The State, 26 Miss., 77.

The court ought to have quashed the special *venire*. Art. 295, Rev. Code, 620, which prescribes the manner of drawing the *venire*, allows the officer no discretion to throw out the names of any persons drawn by him; and the statute of 1870, already cited, p. 88, provides that no distinction shall be made among citizens in selecting juries. See Boles v. The State, 24 Miss., 454. If the court erred, as we think it did, in these rulings, the prisoner is entitled to his discharge. Const. 1869, art. 1, sec. 5; Hart v. The State, 25 Miss., 378; Slaughter v. The State, 6 Humph., 410; 22 U. S. Digest, 83, sec. 19; 20 U. S. Digest, 124, sec. 14; 11 Iowa, 350; 18 U. S. Digest, 93, sec. 5; 4 Cal., 376; 13 U. S. Dig., 71, sec. 1; 14 Swann, Tenn., 35; 2 Law Times Dig., p. 25.

On the question of the admission of the confessions of defendant, see 40 Ala., 58; State v. Rice, Miller, Goodloe and Patrick; and State v. Davis, 17 Ala., 415. Also U. S. Crim. Digest, 160; Bush. N. C. Rep., 239.

That the witnesses should have answered the question put to them as to "what was their respective 'avocations,'" &c., see 1 Greenl. Ev., sec. 454–'5–'6–'7–'8–'9, and note; and even if the answer would criminate the witness, the privilege to decline is merely personal with the witness. 37 Miss., 402, 403, 404.

The illegality of the testimony of the witness Willis Meadow, seems too clear to require either argument or authority.

The charges given on behalf of the state are erroneous; especially charge number 4. Here the court invades the province of the jury by assuming that the killing was done by the de-

fendant, ignores the *venire* altogether, and tells the jury they may find the defendant guilty. This charge also announces an erroneous principle of law. The true principle is that when the killing is proved the burden of proof changes, unless the evidence which proves the killing also furnishes the excuse. 28 Ala., 89; 37 Ala., 142; McDaniel v. The State, 8 S. & M., 417.

The charge numbered 5 is likewise erroneous. The principle governing is, "the circumstances must be such as to create a reasonable belief in the mind that such necessity exists." 26 Ala., 23; Carroll v. The State, 23 Ala., 28; Oliver v. The State, 17 Ala., 587. And the conclusion of the 6th charge is similarly erroneous.

Charges 8, 9, 10 are erroneous, especially the latter, which assumes the killing by the defendant, and ignores the venue of the killing altogether. It does not leave it to the jury to determine whether the defendant killed the deceased or not, or under what circumstances, or where the killing may have occurred.

Charge 15 deprives the defendant of the benefit of a reasonable doubt. What constitutes murder is a question of law; the belief of the jury is another question. They should be informed what constitutes sufficient, material, and substantial facts—the jury are not competent to determine what facts "are material and necessary to the issue."

Charge 15 invades the province of the jury in assuming that the witnesses for the state were not impeached, and that no evidence was offered to impeach them, and declaring that the evidence for the state was competent. The witness Smith was directly impeached by proving statements made out of court totally at variance with his sworn testimony, and which he swore he never made. Besides, this charge is in direct conflict with charge 9, given at defendant's request, and the court cannot say which charge may have influenced the jury.

The court erred in refusing the first charge refused by the court on the part of the defendant. It does not assume that in giving it the court authorized the jury to find "not guilty;" it declares to the jury that by virtue of authority vested in them, they have the right to find "not guilty;" not that they are authorized by the court to do so.

In support of the charge refused, see 1 Greenl. Ev., secs. 380, 381.

In support of the third charge so refused, see *ex parte* Wray, 30 Miss., 689–'80; Cotton v. The State, 31 Miss., 504.

In support of the fourth charge so refused, see Algheri v. The State, 25 Miss., 584.

In support of the 5th charge so refused, see Mickle v. The State, 27 Ala., 20. Under the 6th refused charge, see Cotton v. The State, 31 Miss., 504. Under the 7th charge refused, Commonwealth v. McKie, 1 Lead. Crim. Ca., 295; Commonwealth v. York, ib., 322, and dissenting opinion of Wild, J.

In cases of felony, it is well established that the record must show that the prisoner was present in court when the sentence was pronounced, and was asked by the court if he had anything to say why sentence should not be pronounced on him. 1 Parker's Crim. Rep., 474; citing Blackstone and Chitty in its support.

J. S. Morris, attorney general.

The first question presented by the record is, can any exception be taken to a grand jury after it was sworn and empaneled? This question, it is submitted, is entirely disposed of by the statute. Rev. Code of 1857, p. 499, art. 131. And although the constitution of 1869 and the act of the legislature of 1870 may have changed the qualifications for grand jurors, it is submitted that the rule of *practice*, prescribing the time and manner of exception to a grand jury, remains unchanged.

But suppose that this grand jury were in fact an exception to the general rule, and that objection could be taken and considered, under a plea in abatement, or motion to quash the indictment in this case, or by motion in arrest of judgment (which is denied)—was this grand jury, in fact, illegally constituted? The only ground relied on to establish its illegal constitution is the *assumption* by counsel that its members were not selected "from the entire body of persons liable to jury service in the county," but from householders and freeholders alone; and to prove this, a copy of the order of the board of supervisors of the county, appointing the grand jurors, is

embodied in the bill of exceptions, and quoted—or rather misquoted—as showing that such was the fact. And all the arguments and authorities urged upon this point are made to depend upon this assumption and this misquotation of that order.

It is most remarkable that learned counsel should be betrayed into such a mistake. The order of the board of supervisors shows no such thing, but the very reverse. The order is as follows:—"Ordered by the court that the *following named persons* be and they are hereby appointed grand jurors for the August term of the circuit court of said county," &c. Not one word is said about freeholders or householders, or any other qualification or description, except that they are described by their *names*, and as *persons* of their respective "beats" from which they were respectively selected. Hence, all this part of the assignment of errors vanishes, and the arguments and citations of authorities have no application.

It is true that the clerk of the circuit court in the *venire facias*, and in the entry on the minutes, refers to the persons selected, as "free or householders;" but this is mere *form*, resulting probably from the habit and practice in his office under the former statute, and may be likened to the habit, still very common, of describing defendants in indictments by the addition of "yeoman," "laborer," or "spinster" after the old forms, but without any reference to the facts. Or it may have actually occurred that, although selected from all the competent persons in the county, those selected were by accident all freeholders or householders. In any event, as the record does not show any misconduct in the selection of the members of the grand jury by the board of supervisors, or by the circuit court, in examining, swearing, electing, or impaneling them, the grand jury, even if subject to exception and objection in the manner and at the time it was attempted in this case, must be presumed to be a good, regular, and valid grand jury. In support of this proposition, see the following familiar cases: Dowling v. The State, 5 S. & M., 644; Cody v. The State, 3 How., 27; Thomas v. The State, 5 How., 20; Easterling v. The State, 35 Miss., 210; 2 Porter (Ala.), 100; Grah. & Waterman on New Trials, 717; Stewart v. The State, 1 Ohio, 66.

2. The next question is as to allowing the counsel for the defense to ask female witnesses for the state, in cross-examination, questions respecting their own "occupations" and "associations." These questions, as shown from the statements of other witnesses in the case, and from all the circumstances, were asked solely for the purpose of degrading, embarrassing, and exposing the witnesses under cross-examination to a criminal prosecution; and, whether asked for such a purpose or not, they necessarily and manifestly had this tendency and effect. Besides, the questions were totally *irrelevant to the issue before the jury*. And under these circumstances, it was the duty of the court to interfere, even without objection, to prevent the question from being answered. See U. S. v. Dickinson, 2 McLean, 325; U. S. v. Vansickle, ib., 219; Lohman v. People, 1 Comst. 379; Howell v. Comm., 5 Gratt., 664; Roscoe's Nisi Prius, Evi., 175; Comm. v. Churchill, 11 Metc. Mass. R., 538; Comm. v. Moore, 3 Pick., 194; Smith v. Castles, 1 Gray, 112; People v. Mather, 4 Wend., 251–257; Barnes v. The State, 19 Conn., 398.

3. As to the instructions for the state, objected to because bearing on the weight of evidence, and thus invading the province of the jury. The objection in this case must certainly be disallowed, as falling within the principle laid down in the case of Wesley v. The State, 37 Miss., 350.

4. In respect to objections to other instructions, it is sufficient to say that all the instructions, when construed together, *as a whole*, contain a fair and correct exposition of the law applicable to the case; and this is all the defendant had a right to claim. Childress v. Ford, 10 S. & M., 29; Mask v. The State, 36 Miss., 91–94; and authorities cited in the opinion of the court.

5. The verdict and judgment are clearly right under the proof. Indeed, it can scarcely be denied that the sentence is far less severe than the accused could have reasonably expected, considering the magnitude of his crime, and the facts and circumstances under which it was perpetrated. And even "error in instructing the jury is *no* ground for a new trial, if it is manifest that the verdict is correct." Cameron v. Watson, 40 Miss., 191. And a righteous verdict cures the error of admitting illegal testimony. Mary Washington v.

McIntosh, 37 Miss., 670; Josephine v. The State, 39 Miss., 613.

SIMRALL, J.:

1st. It is claimed, first, that the indictment ought to have been quashed, because the grand jury was not constituted in accordance with law, to wit, Art. 1, § 14, of the Constitution, and the act of July 20th, 1870, Pamphlet Acts, 88. The combined effect of these provisions is to abolish property qualification for jury service, and impose the duty on all citizens alike, who are electors, and not within some special exemption. In all other respects, as to the mode of selecting, summoning, empaneling, and preferring objections, the previous laws, not abrogated by the Constitution and act of 1870, apply.

The judicial records of the country furnish mortifying testimony that many culprits have gone free, unwhipped of justice, because of technical exceptions taken to the grand jury who preferred the indictments. For remedy of this sore grievance, the legislature, in 1859, made two important amendments to the law. First, no objection by plea or otherwise shall be raised to the empaneling of the grand jury; but the empanelment shall be conclusive evidence of its competency and qualifications. Rev. Code, 449, art. 131. When the body has been organized, sworn, and charged, it is too late to prefer objections. Any person interested, whose conduct may be the subject of its inquiry and investigations, "may challenge, or except to, the array for fraud." This simply cuts off the plea in abatement, challenging the fitness or qualification of the body, or of any of its members. Art. 250, Rev. Code, 613, instructs the courts to regard all the laws of the state relating to the mode of selecting, drawing, summoning, and empaneling all juries, as *directory merely*. And after they are empaneled and sworn, though in an irregular or informal mode, they must be esteemed legal, and competent to perform all the duties belonging to juries; and this applies to both civil and criminal proceedings, to grand and petit juries. The cases referred to by counsel for the plaintiff in error occurred prior to the adoption of the Rev. Code, and

doubtless suggested to the legislature the necessity of a reformation of the law. It follows that the exception taken to the grand jury ought not to prevail.

2d. It is the duty of the court to superintend the selection of the jury, in order that it may be composed of fit persons. Large discretion must be confided to the court in the performance of this duty. Nor will the action of the circuit court in this behalf be the subject of review here, unless some violation of law is involved, or a gross and injurious exercise of discretion is shown. The primary object is to insure a fair, unbiased jury. Brown v. Gilliam's Ex'r, 43 Miss., 641. The objection to the *special venire* is not well taken.

3d. It is next urged that the confession of the prisoner ought not to have been admitted, because he was not warned of the probable consequences, and it did not appear to have been voluntary, &c. There does not appear in the record such formal confession as the case cited by counsel refers to. The defendant, who was within a few paces of the parties at the time of the shooting, and saw and heard what was done and said, deposes as to the response of the defendant as to the effect of his shot. This response was heard by a female witness, some thirty or forty paces off. The statement connects itself with the act, and forms part of the *res gestæ*. It was clearly admissible.

For the purpose of discrediting a witness, it is competent to prove that he made discordant statements at other times and places; but to re-establish credibility, or to support what he has deposed to on the trial, it is inadmissible to prove that he has made substantially the same statements to a third person. Many years ago the British courts received such testimony, but afterwards its propriety was doubted, and finally repudiated. The weight of authority and reason is against it. Parker's case, 3 Doug., 242; 1 Starkie's Ev., 187; Brazier's case, 1 East P. C., 444; 3 Barb., 410; 24 Wend., 465; 13 Vt., 208; Conrad v. Griffin, 11 How. S. C. Rep., 490. The testimony of the witness Meadow, detailing the narrative made by the witness Smith to him, ought to have been excluded.

The interrogatories put to the female witnesses were doubtless for the purpose of presenting them as infamous characters,

and casting more or less suspicion on their testimony. We think the questions were legitimate. The witness may decline to answer a question which may tend to criminate him or her, or bring them into disgrace and reproach. But this is the privilege of the witness. It is the duty of the court to advise the witness of this privilege to answer or not. The state cannot interpose the objection. Nor does it follow, if these females were of the character shadowed forth in the testimony, that they must be discredited. The jury is the judge of the credibility of a witness. If the law esteemed a class of persons untruthful because of a vocation reprehensible and immoral, it would exclude them altogether. The manner, freedom from bias, consistency, and general bearing and deportment of a witness, are all subject to the scrutiny of the jury, affording generally abundant indicia for a proper weight of testimony. We esteem it not impertinent to venture the suggestion to those representing the public justice in important trials, not to raise or press objections to testimony, especially on collateral and not vital points, unless clearly inadmissible. It is manifest that the answers to the interrogatories objected to by the state's attorney would have had no material influence on the issue before the jury. The state has no right to exclude the answer, if the witness is willing to give it. In such cases, it is the duty of the court to admonish the witness of her situation and privilege.

We would not disturb a verdict for any supposed error in the instructions, where the verdict is manifestly right on the evidence, and it does not appear that the accused was prejudiced by any one of the charges of the court. Wesley v. The State, 37 Miss., 350. Nor has the accused a just ground to complain, if prayers of instructions are denied, when the true principles of law are embraced in those already granted. The court should charge the jury on all the points included in the written prayers, provided they are applicable to the case. When the law upon a particular subject has been fully stated to the jury, the court may well decline to go over the same ground again, at the instance of either party.

There is some confusion in the fourth instruction granted for the state. It is incumbent on the state to prove the allegations

of the indictment, or, as it is phrased in the instruction, "*to* make out its case." The burden of proof rests upon the prosecution throughout the trial. Where a killing has been proved, the burden of proof changes, and it is then incumbent on the defendant to show excuse or justification, &c.; and if the defendant has failed to do this, the jury may find him guilty." Such is its language. But suppose the excuse or justification arises out of the facts attending the killing brought out in the state's evidence: must the jury convict? The true proposition of law is, if there be no excuse or justification for the homicide by the accused, shown in the evidence adduced by the state, then the accused is guilty of murder, unless he has by his evidence proved excuse or justification. Generally, the circumstances immediately surrounding and attending a homicide give it complexion as criminal, excusable, or justifiable; and the proof of these fixes its character. These circumstances generally, as in this case, are developed by the testimony for the state, while establishing the main fact of the killing. It tends to mislead the jury, and involve them in confusion, by separating the single fact of death by violence at the hands of the accused from the other concomitant circumstances, and deducing from the killing done a presumption as to its character.

The use of a deadly weapon is *prima facie* evidence of malice, because a man must be taken to intend the necessary and usual consequences of his act. To shoot, or stab, or strike with a bludgeon, indicates a purpose to take life; but if the one or the other be employed to disable an adversary in the very act of making a murderous or malicious assault, then the presumption is overcome. The proof of the use in the case hypothecated of the deadly weapon, with attending circumstances, would show the excuse. Where the circumstances of the killing are known and in evidence to the jury, the deductions and inferences should be made from all the facts. When the death ensues from a gun-shot wound, or a stab, or other violent means, but no witness saw the act done, and the circumstances are unknown, and unproved by the state, here the mode of killing raises a strong presumption of malice. If the act is traced to the accused as the guilty agent, that presumption con-

tinues until he overcomes it by evidence showing excuse or justification. If he offers no explanation of the killing, if he fails to show that it was an act of necessity, done *se defendendo*, the inference of malice, from the use of a deadly weapon, remains. What we mean to affirm is, that where the mode, manner and circumstances of the killing are in evidence to the jury (although life was taken by a deadly weapon), the character of the act, whether criminal or not, and then its grade, whether murder or manslaughter, or whether excusable or not, is to be gathered from the entire body of the testimony. To use a deadly weapon justifies the inference that the accused meant to kill; but whether he was excusable on the ground of *se defendendo*, depends on the facts and circumstances with which he was environed at the time. The law esteems the life and limb and bodily safety of every human being equally; therefore every man may protect his life and limb at whatever hazard; but the danger must be present, immediate and imminent. A fear or apprehension arising from previous threats, which have been communicated, afford no excuse—none whatever, unless at the time of the killing, an effort was being made to carry the threats into execution, and a necessity, apparent or real, existed at the time to slay, in order to prevent it. We discover no substantial objection to the other instructions granted for the state.

The first instruction refused at the prayer of the accused, invited the court to charge the jury as to the weight or effect of the testimony, and was properly refused. The second instruction, while true as an abstract proposition, was inapplicable to the case. The accomplice was supported in many, if not all, of the material facts of his testimony. The female witnesses, one of them especially, proved the shooting. It was by no means a case where conviction depended on the unsupported testimony of an accomplice.

The third instruction was also properly refused. The fact that a man is permitted by law to carry arms, and the further fact that many persons do bear about on their persons deadly weapons, do not in the slightest degree diminish the responsibility for an improper use of them. We cannot, and do not

Shelton & Shelton, for plaintiff in error.

In their answer to the petition, the auditor and treasurer set up no other reason against the peremptory *mandamus* except the constitutional prohibition and the act of the legislature.

We do not controvert the principle that a state may, by legislation, repeal or alter the franchises of a municipal or political corporation, nor shall we controvert that position as applicable to a corporation created only for the state's advantage.

On the other hand, we shall take it for granted that the charter of a private corporation for trading purposes is a contract, the obligations of which, under the constitution of the United States, cannot be impaired by a state. 4 Wheat, 514; 16 How. U. S., 369; 18 How. U. S., 331.

But, between these two classes of corporations, there is a third class in which the corporation is for trading purposes, but from which the state or public receives some benefit or advantage. In such cases the state's power over the charter after it goes into effect, does not extend beyond the right to repeal, release, or abrogate the provision made in the charter for the benefit of the state or public. It does not extend to an abrogation either by a general repeal or special abrogation of the charter franchises granted to the corporation as a company. Nor can the state repeal the charter *in toto*, because by such repeal the franchises conferred by said last-named sections would be abrogated. But in this case it is not a question of repeal of the entire charter, but only as to the abrogation of the more reliable franchise contained in the charter, to wit: that granted by the fifth section, leaving to the company its existence with all other franchises that incumbered it with the obligations of the seventh section. The abrogation of the lottery franchise neither repeals the charter nor destroys the corporation; it only deprives the corporation of that franchise by which they mainly expected to make the capital stock invested by them profitable, and without which franchise the corporators would never have invested their money.

The foregoing positions are simple, and within the well-defined law of contracts. The statement of them is, "on prin-

ciple" alone, argument enough; but we will refer to the authorities.

Though the state or the public may derive benefit from the corporation, yet if "the whole interest" does not go to the state or public, the corporance is private. Angel & Ames on Corp., §§ 31, 36, 767.

If the stock is owned by private persons, the corporation is private, though the use may be public. Angel & Ames on Corp., §§ 31, 36, 340.

The material question then is, did the charter take effect as a contract before the constitutional provision against lotteries was adopted?

It will be remembered that the charter had been adopted, accepted by the corporation, organization had under it, and the $5,000 tendered and refused, months before the constitutional prohibition was adopted. Now, that charter was granted to "two particular persons by" name (as corporators), "their associates and successors;" these were then, from the beginning, corporators in being as such. By the terms of the charter, the corporators are "hereby declared to be a body corporate, under the name of 'The Mississippi Society of Arts and Sciences.'" The franchises are conferred without condition or postponement, and the right to them created then and there *in presenti;* and the act expressly provides that it shall take effect from and after its passage. Now, an act incorporating certain "named persons," and such other persons as may be associated with them, confers on the persons named "at once" the franchises of a corporation. 2 How. S. C. R., 278.

It was, therefore, a corporate body from the time of the adoption of the charter. It may possibly be said, that there is no proof of an acceptance at the time by the corporators named in the charter. "A charter is presumed to have been granted at the instance of the persons named in it, and to have been accepted by them, and it requires proof to relieve that presumption." 5 Cranch C. C. R., 632.

But in this case, it would create no difference, if we were to concede that the corporation was not in being until "actual acceptance proved;" first, because we aver immediate acceptance,

and it is not denied; second, because the organization occurred, and the $5,000 were tendered before the constitutional prohibition. Whether, therefore, "the existence of the corporation" is to be dated from the date of the charter, or from the time that charter was actually used by the corporators as provided, or had existence and was a corporation in being under its charter before the constitutional prohibition; that prohibition, therefore, in it abrogated the lottery franchise contained in the fifth section of the charter; impaired the obligations of the charter contract in a franchise most useful, for the purpose of making the capital stock invested by the corporators profitable to them.

If it be insisted that the charter was a conditional proposition, and was not to confer any rights on the corporators until the $5,000 should be paid into the treasury, and that the state had the right to withdraw her proposition at any time before that payment, I answer, that the charter is not made to depend on any condition precedent; nor is any condition subsequent made to operate a forfeiture of it. The charter provides that before commencing business the company shall pay into the state treasury $5,000, and thereafter annually one-half of one per cent. on the sale of tickets. Now that, if a condition at all, is not a condition precedent to the charter taking effect, but only a condition precedent to commencing the business authorized by the charter, by a corporation in being. Now, the corporate body could not make a payment before it had its existence. It is, therefore, apparent that if it be a condition at all, it is a condition precedent to the commencing of business, and not a condition precedent to the existence of the charter, or the corporation. But, if it were otherwise, it would create no difference; for, if it be true that the state legislature had created a charter to take effect only on payment of $5,000 by the corporators to the state, only the legislature could, before payment, withdraw or repeal the charter; the auditor and treasurer had no such power of either withdrawing or repealing the charter. It was only their duty, so long as the law was in existence, to obey it and take the money. When, therefore, it was tendered to them, and they refused to accept it, the corporation had performed the

condition precedent, and their franchises, even under this view of the question, became vested. It was not until after that tender that the constitutional prohibition was passed. But the payment of the $5,000 was not a condition at all. It is simply a legal requisition, creating an indebtedness by said corporation from the moment that the charter was accepted, and to be paid before commencing business. The corporators must either refuse the charter or pay the $5,000, and also the annual tax. There is neither condition to nor defeasance of the charter contained in the section, but simply a requisition on a corporate body in existence.

The $5,000 clause is not in the form of a condition. It is not even a proviso to the charter, or to any franchise conceded by the charter, but is an independent section creating two liabilities, to wit: the $5,000 before commencing business, and the half of one per cent. annually afterwards. If the company had commenced business without paying the $5,000, the state's remedy would be plain by *quo warranto*, not to test the existence of the charter, but only to arrest the commencing of business under the charter, until payment of the money.

But I may be told that dealing in lotteries is immoral and *contra bonos mores*, and, therefore, the state had the right to prohibit them. That might be a good argument if the right was not created as a charter contract between the state and the corporation; that is, if it did not come under the protection of that clause of the United States constitution which prohibits the state from impairing the obligation of a contract. But it will not do to say that the state may at one time make a valid charter contract, granting a particular franchise, and after it has taken effect as a valid contract, immediately on the ground that the franchise is against morality, abrogate the franchise, which constituted perhaps the greatest inducement on which the corporators accepted the contract. The state has the clear right to prohibit any more such contracts, but not to annul or impair the obligations of one already made. A legislature might conclude that all banks, or all railroads, are *contra bonos mores*, and abrogate the banking or the railroad franchise, and so of every other corporation.

But an argument will doubtless be founded on that clause of the charter which declares the purpose and object of the charter to be for the benefit of common schools of the state. See last clause of section 1.

Now that benefit is really measured by the charter itself. It is confined to two items. 1st. The $5,000 to be paid "before commencing business." 2d. The annual tax or bonus of one-half of one per cent. on the sale of lottery tickets. Subject to these, the corporators are the only stockholders, and furnish all the money; they are entitled to the benefit of every franchise granted by the charter for the purpose of making profit on their capital stock invested, and own, as a corporation, all the property that may be accumulated, and are liable to all the acts created.

A single principle will put this question to rest even; public and municipal corporations may stand in respect to franchises granted to them by the state on the same footing as would any individual or private corporation. If the powers conferred be granted exclusively for public purposes, they belong to the corporation in its public and municipal character; but if for purposes of private advantage, though the public may derive benefit therefrom, the corporation *quoad nos* is to be regarded as a private company. Angel & Ames on Corp., 33; 2 Hill, 531.

Another principle is also decisive of this question.

A hospital, a college, or other public school, founded by private benefaction, is a private corporation, although, by its charter, it may be dedicated to public use. Angel & Ames on Corp., 34; 2 Kent, 222; 4 Wheat., 668; 1 Sumner, 276; 3 Ga., 283; 13 B. Monroe, 642.

In this case all the capital invested is the capital of the corporators; the state invests nothing. All the property is to be owned by the corporators, all the profits (except the two bonuses) are theirs. All the franchises are granted to them to enable them to make profit on their capital stock invested. Although it be true that common schools is a public institution, aid to which may have constituted the object of the legislature in granting, and of the corporators in accepting the charter, yet since the charter measures the benefit to that institution by two

money bonuses from the corporation, and recognizes all other benefits as belonging to the corporation, and grants the lottery and other franchises for the purpose of enlarging those benefits, then these franchises come under the first principle above quoted, and, *quoad nos*, the corporation is to be regarded as a private company.

Again, regarding the object as a public one, under the second principle above quoted, it is still a private corporation, the plain result of all which is, that the control of their own money and the use of the corporate franchises to make it profitable for the public purpose to the extent specified in the charter, whether wholly or in part, was a part of the charter contract upon which they invested their money, and without which they would not have invested it for the public purpose, and therefore neither the money nor the franchises could be taken from the company by the state without violating the obligations of the contract.

Upon the foregoing principles, the state had no power either through her constitutional convention or her legislature, to abrogate the lottery franchise after the charter had been accepted by the corporators, and, therefore, the *mandamus* should have been granted.

J. S. Morris, attorney-general.

The two rules—that every pleading must be taken most strongly against the pleader—and that every demurrer must relate back to the first substantial defect in the pleadings—being applied to this case, the petition was properly dismissed, and there is no error in the judgment of the circuit court.

The petition is itself defective, in that it claims "a vested right" under a contract implied by a charter to set up and carry on a practice deleterious to sound morals. Lotteries have been so characterized and treated by the laws of this state for fifty years. Rev. Code of 1857, 597; Hutch. Code, 945; Act of 1822, Poindexter's Code, 326.

There can be no vested right, under contract or otherwise, to do wrong or violate good morals. Baugher v. Nelson, 9 Gill (Md.), 309; Satterlee v. Mattheson, 16 Serg. & R. (Pa.), 191.

Contracts *contra bonos mores* are void. 4 Campb. 152; 1 B. & Ald., 683; 16 East, 150.

The petition is defective, because it does not show that petitioners have, but, on the contrary, shows that they have not, complied with the terms of their charter. It not only fails to show that they are not themselves in default, but it admits that they are. 1 Freeman's Ch. R., 357.

For example, though it claims in general terms that "said association is organized," it does not even pretend, in any terms, that the corporators, Lindsey, Smith, and "their associates and successors," or any or either of them, or their agents or attorneys, proxies or assigns, organized said association, or participated in or consented to its organization, or to the appointment of its pretended agents, or the employment of any attorneys, or even to the institution of this suit. It does not pretend that there was ever a meeting of the corporators held or called, nor state when, where, how, by whom, or upon what (if any) notice to members or to stockholders, said pretended organization took place. And all these matters are of vital importance. See Acts of 1866–7, 403; Rev. Code of 1857, 291, art. 4.

The *time* of the organization is important to the state, because the president and directors, by the terms of section 2 of the charter, are to hold their offices for one year from the date of the election; and by the 7th section, the iniquity is to continue for twenty years from its organization.

The *place* is essential, because a private corporation whose charter has been granted by one state, cannot hold meetings, pass votes, and exercise powers in another state. Angel & Ames on Corporations, 80, § 104 (8th edition).

The *mode* by which it was organized is important, because by principle it should have been by a vote of the company, by deed and under seal. Angel & Ames on Corp., p. 89, § 112; ib., p. 97, § 126; ib., § 232; ib., §§ 489, 490, 491, 492, 493, *et seq.*

And the *notice* upon which, and persons by whom such organization and election took place, is extremely important to the state in a case like this; not only for the prevention of

fraud as respects the rights of the corporators, but to prevent the state from being imposed upon by an unlawful transfer of the franchises conferred by the charter, which, it is open and notorious, has occurred in this very case.

But the petition is defective, not only in its total failure to make the necessary and indispensable averments and exhibits of the plaintiffs' compliance with the terms and conditions of the charter, and of their right to sue, but also in negativing, as it does in palpable terms, the payment of the $5,000 into the state treasury, and the execution of the bonds required. True, it says the amount was "tendered;" but it avers, and proves by its exhibits, that because of military interference, the money was not received. But it is to be observed, that this was two years and eight months—an unreasonably long time—after the date of the charter, when the state authorities, having every reason to suppose from the lapse of time and non-user of the franchises proposed, that they would not be accepted, had already framed and was about submitting to the people the present constitution, containing a prohibition against this species of immorality. And it is totally immaterial whether the military commandant had any rightful authority to interfere or not. The petition shows that he did interfere, and that, whether he had the lawful authority or not, he certainly had the power to induce both the treasurer and the party tendering the money to stop, and finally to yield, and that they did yield, and the money was in fact not paid. If it was unlawful for the treasurer thus to yield to military interference, it was equally unlawful for the party tendering the money to do so. They all yielded—as much on the one side as on the other—for the petition shows that the money was never again tendered at the treasury. Why was not the matter pursued in the courts then? The state did not pursue it, because she was not aggrieved. She was willing that the inchoate lottery, with all its disinterested "benefits to schools," should perish and never ripen into vitality. She was not in any respect responsible for the military interference; but she had no disposition and no interest to resist that interference. She was anxious then, as she is now, that the negotiations, commenced in an evil day, should remain

in fieri—in the form of an unaccepted offer, on her part, to grant an immoral franchise, but upon terms as yet uncomplied with; and that the other party to the negotiations should remain in a state of hesitation and default, until she should be in a condition lawfully to withdraw her offer by a practical repeal of the nefarious charter.

But the petition being thus liable to demurrer, and palpably defective, in not averring payment of the money, is, if possible, still more so, in admitting, as it does, that petitioners or their pretended president and directors have never given, or even tendered to the treasurer for his approval, any bond and security, conditioned for the faithful performance of their duties as required by section 8 of their charter. Acts of 1866–7, p. 406.

And, regarding the transaction between the state and petitioners in the theory of a contract, there is an utter absence of any pretence to that mutual and contemporaneous consent which is the soul of all valid contracts. The state, by an act of her legislature (or that which passed for a legislature), consented, or offered her consent, at one time. But when did the other party consent? Two years and eight months afterwards, when the state was under duress of military control—when a military officer presided in her executive office, and another military officer in her treasury; when the people of the state had framed, and were preparing to submit to the people at the ballot box, a constitution forever withdrawing her unaccepted offer. Then it was, petitioners allege, that they made the first and only expression of a willingness on their part to comply with any of the several conditions upon which the franchises named in the charter were to be theirs; and that the acceptance of the part tendered was prevented, not by the voluntary action of the state or any of her officers, but by military interference.

For this interference petitioners would have it believed that they are in no way responsible. Certainly they are not. Neither is the state. It was the interference of a power almost as much beyond the power of resistance by the state as by the individuals claiming the franchise. But like much of the mili-

tary interference of which complaint is so often made, this interference was most salutary, and may yet prove the chief means for preventing the establishment, under the disguise of a false and fraudulent name, in every city, town, village and neighborhood in the state, for twenty years, of a most pernicious and despicable vice.

The lottery scheme remaining thus unaccepted by the schemers, and all the reciprocal conditions upon which it was to become a vested right in the corporation, being wholly unfulfilled, partly by the intervention of the military commander, and partly from neglect or inability of the corporators to organize the concern and give the bonds required by their charter, the new constitution with its prohibitory clause against this species of vice, was adopted and became part of the organic law.

Thus, the proposition of the state, if it ever was legally made, was distinctly and absolutely withdrawn before its acceptance, before it had acquired any legal form, and before any right to the franchises named in the charter vested in the corporators. And all these facts and deductions are made clearly and palpably to appear by the petition itself, and are the first defects in the record, and to these, according to the rule, the demurrer of the petitioners must first attach. See 1 Chitty's Pl., 668. And being palpable on the face of the petition or clearly deducible from it, they are, if possible, stronger and more fatal to petitioners than if they had appeared in any pleading on the side of the state, or of its officers who are sued. Gould on Pl., 153.

Mr. Benjamin, in his works on Contracts of Sale, has made, in one chapter, a collection of English and American cases, illustrating the universally admitted right of one party to negotiations to *withdraw* an offer to contract, at any time before its final and complete acceptance by the other. See Benjamin on Sales, 28, *et seq.*

But there is one feature of the charter from which it might very properly be adjudged to create a public, and not a private, corporation. The latter clause of section 2 expressly declares that the purpose and object of this charter is for the benefit of

the Common Schools of the state of Mississippi. And although this declaration may be, and probably is, false, and intended to disguise the real design of the charter, the petitioners in this proceeding are especially precluded from denying the truth of anything contained in their charter, because it is a part of their case. Revised Code of 1857, 249, art. 83; ib., 516, art. 224; 6 Cranch, 144.

But if it be true that "the object" and "the purpose" of the act was "for the benefit of common schools," can it be doubted that it is for the state, who is the guardian of these schools, and not the corporators, who are the mere agents of the public object intended, to judge and determine of the propriety and wisdom of abandoning and annulling this, and adopting other and different means for promoting that object? Gutzweller v. The People, 14 Ill., 142; Butler et al. v. Pennsylvania, 10 How., 402. But whether this proposed lottery be a public or a private corporation, or its object be to benefit "arts and sciences," or "schools," or only to plunder the public and debauch the public morals, in order to enrich the owners of a lottery, the completion and continuance of the scheme in this state, is a question which the constitution-making and law-making power is to decide, as it may all other questions of police, or of protection to the public morals or public order. Ohio & Mississippi R. R. Co. v. McClelland, 25 Ill., 142-5; Vanderbilt v. Adams, 7 Cowen (N. Y.), 349; Hirn v. The State, 1 Ohio, 15; Toledo Bank v. Bond, ib., 622; The State v. Phalen et al., 3 Harrington (Del.), 441; Freleigh v. The State, 8 Mo., 614; State v. Hawthorn, 9 ib., 389; Presb. Church v. City of N. Y., 5 Cowen, 538; Gregory v. Shelby College, 2 Metc. (Ky.), 589; Toolusane v. Sedgewick, 15 Cal., 515; Barber v. Gregory, 31 Conn., 264; People v. N. Y., 32 Barb., 102; State v. So. R. R., 24 Texas, 80; State v. Jones, 6 Wisc., 334; Bishop's Fund v. Ryder, 13 Conn., 87; Oriental Bank v. Freeze, 6 Shep., 109; Phalan v. Va., 8 How., U. S. S. C., 163; Gorman v. Pac. R. R., 26 Mo. (5 Jones), 450.

These cases illustrate the general and undeniable right of the states to limit the principle of vested rights under charters, licenses, and contracts, in all cases, so far as may be necessary

to preserve, absolutely, the morals and policy of the states, and keep their police power over the community forever free. Many of the cases cited were lottery cases; and the disfavor with which this species of enterprise is regarded by the courts as being in violation of good morals, is apparent in them all. In none of these cases was there any dispute about the act of incorporation having been accepted, and the transaction being completed in its organization under the law. And yet the right of the state to control or annul them is generally maintained.

At the time of the adoption of the constitution of 1868 by the people, and its approval by congress, this supposed contract remained *in fieri*, in the shape of negotiations tending towards, but never having reached the condition of a valid contract. Partial performance of conditions had been attempted, but wholly failed. Full performances had never been attempted or pretended. Money had been offered, but not paid in. The bonds had never been prepared or offered.

Thus the matter remained, and thus it still remains—inchoate and incomplete. The very assumption set up in this proceeding that something more is necessary to be done by the state or its officers, is an admission that it was never completed, and that as yet no rights have "vested." If this were not so, why do not the petitioners proceed with their enterprise, and repose, as they might well do, upon their tender of performance?

This application came too late. The constitution and laws which the present state officers are bound to obey, having not only annulled this charter, but stamped the strongest reprobation upon every species of lottery, it is clear that these officers can do no act in their aid. No money can now be accepted or received by any officer of the state for that purpose. All "aid" or "connection therewith" is positively prohibited, not merely to public officers, but to all other persons in the state, under penalty of fine or imprisonment. If these petitioners have had fully vested in them this constitutional right, independently of the present constitutional and statutory regulation, why apply to the state, to its officers, or to courts, for aid and assistance? What is it to the petitioners that the auditor and treasurer refuse to receive five thousand dollars, or to take, approve, and

file bonds? The state, who fails to receive the money or the indemnity, might have the right to complain, and sue out process to compel her officers to perform these acts. But the petitioners, being in the uninterrupted enjoyment of their vested rights, are not injured, and have no reason to complain. But the desire to create rights which have not vested, and which can only vest on the payment of the money and the execution of the bonds, is a confession that they have not already vested. It is a confession that in this admitted state of facts, and in the face of existing prohibitions and penalties, they dare not commence to do business. Their boasted rights and franchises are only in the bud and flower, and cannot, without some further act of the state, ripen into fruit. The law says "let them perish in the flower!"

Simrall, J.:

This is a proceeding by *mandamus*, instituted by the plaintiff in error, a corporation created by act of the legislature of 1867, to compel the treasurer to approve the bonds of the president and directors, and to compel the auditor and treasurer to receive into the state treasury five thousand dollars.

The answer of these officers set up that they declined to accept the money and approve the bonds, because the charter of the plaintiffs conferred upon them a franchise to conduct and carry on lottery schemes, and to deal in and sell tickets therein, which is prohibited by the revised constitution, and also by the act of the legislature of 1870. To the answer the plaintiffs demurred. The court held the answer sufficient in law, and dismissed the petition.

The conditions precedent, which must be fulfilled before a right to utilize the franchise inures to the incorporators, are: The payment into the state treasury of five thousand dollars for the use of common schools, and the approval, by the treasurer, of the bonds of the president and directors.

An offer to pay the five thousand dollars into the treasury was made the 18th of October, 1869; but at that time no bonds were presented for approval. On the 2d of May, 1870, a letter was addressed by the plaintiffs to the auditor and treasurer,

reciting the former tender of the money, and expressing a readiness then to comply with the conditions of the charter, by payment of the money and exhibition of bonds for approval, and proposing to comply with all the terms precedent to their right to begin business. No response was made to these proposals; but, prior thereto, the constitutional prohibition, as well as the act of the legislature against drawing lotteries or selling tickets, had gone into effect, and annulled the lottery feature of the plaintiffs' franchises; unless, as is contended in their behalf, it is void as to them, because it impairs the obligation of the contract between the state and themselves, as embodied in the charter.

It was settled in the case of Dartmouth College v. Woodward, 4 Wheat., that the "contract" which a state may not impair may as well be contained in a charter granted by itself, or by the proper authority, during the colonial period, as the private agreements of individuals with one another. As yet the judiciary have not been able to define any definite rule by which legislation impugned as conflicting with the constitutional prohibition may be tested. It may be impossible to do so. The constitution on this subject ought, in many cases, to be read and considered in connection with an ancient principle of the common law, which is thus stated, Brewster v. Kitchen, in 1698, reported in 1 Salk.: "If A covenants not to do an act or thing which was lawful to do, and an act of parliament comes in after and compels him to do it, the statute repeals the covenant. So if A covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed." It would be safe to say that all legislation which has the effect of impairing the contract, is not obnoxious to the constitutional prohibition. If the operation of the statute be but incidentally to impair the contract, when it is passed with reference to a totally different subject, altogether *diverso intuitu*, it may be upheld. To illustrate, if a contract should be made to erect a wooden structure, in a densely populated city, and a statute should come in and forbid the building of such a house, it would be a case where the covenant would be discharged; this, by the policy of the law, would be to guard against conflagration by fire, and would manifestly be for the good

police of the town. Yet incidentally, it destroyed the obligation of the contract.

So, too, if a contract were made to build a house upon a certain spot of ground, and afterwards the legislature or competent municipal authority should lay out a public road over the ground, here the public convenience must yield or this contract be annulled.

If all legislation must fall under the condemnation of this constitutional prohibition, that might, and did incidentally, have the effect to impair the obligation of contracts; legislative control over internal police and morals would be so hampered and circumscribed as that its practical value would be seriously embarrassed. In Pres. Church v. City of New York, 8 Cow., 539, there was a covenant for quiet enjoyment, in a grant of the premises on the condition "that a church should be erected thereon, or they should be used for a cemetery;" but for private secular uses. Subsequently the city prohibited the use for a cemetery. It was held that the city ordinance "repealed the covenant." The city had the right to ordain proper wholesome police regulations for the public health, and this private covenant must yield to the paramount public good. It may not be inappropriately said, that individuals must be considered as making their covenants and contracts subject to the contingent right in the state, within the just application of the principles we are discussing, of partial impairment, or entire abrogation.

But courts should carefully guard against pushing the doctrine beyond its reason. The prohibition is addressed to the state, and applies to all the forms that the state may employ as lawgiver, whether in convention framing organic law, or in its ordinary legislative capacity passing statutes.

If this charter were granted exclusively to subserve some public purpose, as to raise means to promote common schools, it would not, within the intent of the constitution, create a contract between the corporators and the state. But the legislative power would be complete. Either to amend or abolish the corporation would be but the instrumentality to accomplish a policy. Although the first section declares that the object of

the charter is for the benefit of common schools, there is coupled with it a right to make private gain. The $5,000, and one-half of one per cent. on the sale of tickets, to be paid into the state treasury for common schools, is the consideration upon which the corporation is permitted to draw lottery schemes, they retaining all else as their share of the profits. The mere enactment of the charter does not constitute a contract. The state says, in the charter to the corporators, "organize by the election of officers, execute the bonds to comply with its injunctions, pay into the state treasury the $5,000 for the schools, and then you may begin business and use your lottery franchise." Upon compliance with these terms, a contract between the state and the corporators would have been consummated. Until complied with, there is no restriction upon the legislature resuming the franchises or forbidding their use.

The state may take away by statute what has been given by statute, unless rights under it have vested. If the legislature delegate authority, it can revoke it if nothing has been done under it which creates a vested right.

A pointed illustration is found in the C. & L. Railroad Company v. Kenton county, 12 B. Monroe, 148. The legislature had authorized Kenton county to subscribe to the stock of the company, upon an approving vote of its electors. A vote in favor of subscription and to impose the tax was had, but the county court refused to subscribe and levy the tax. The company applied for a *mandamus*, which was refused. An appeal was taken. Pending the appeal the law was repealed. The court held, that on the condition of facts before the inferior court, the *mandamus* ought to have been granted. But inasmuch as the county court had not made the subscription and levied the tax, no right had absolutely vested in the company before the law was repealed. Its judgment was affirmed.

If that doctrine is sound, as applied to a corporation, created to develop wealth and advance civilization, *a fortiori* must it be approved when invoked to shield the community from a project which is only evil, and that continually. Also McQueen v. Jones, Com'r, 6 Wisconsin, 334.

The authorities are abundant that the legislature may repeal

a lottery grant, unless contracts have been made or rights vested, as between the grantees and other parties, which would be infringed by the repealing law. Gregory's Executors v. Trustees of Shelby College, 2 Metcalf (Ky.) R., 598; State v. Hawthorn, 19 Missouri R. 391; State v. Freleigh, 8 Missouri R., 614.

There seems to be no disagreement in the authorities, that if no money or other consideration is paid for the license or grant, it is open to repeal by subsequent statute.

There are authorities that assert the doctrine that the prohibitory clause of the constitution does not affect the power of the state to enact general police regulations for the preservation of the public health and morals. It was said by Marshall, C. J., in Dartmouth College v. Woodward, "that the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government."

On the ground, therefore, that lotteries were of pernicious and demoralizing influence in the community, some of the courts, without regard to the fact that the grantee had paid a bonus to the state, have supported the validity of repealing legislation. 3 Parson on Cont., 556, and notes.

But it is not necessary that we should go this far. In determining constitutional questions, the proper, and I think it the safer practice, is to confine ourselves strictly to the questions of law that arise on the facts of each case.

If the plaintiff had made a formal tender of the $5,000 to the treasurer, and had presented for his approval unimpeachable bonds, before the repealing laws took effect, these laws would have swept away his franchise; for it would not be predicated that a contract had been perfected before the business was made unlawful.

But the facts are by no means as full and strong as these. Before the prohibition of the constitution and statute, the plaintiff had done no more than to make his tender of the money in 1869. It was after the adoption of the constitution and prohibitory statute that the bonds and money were offered. Both the payment of the money and the execution of the bonds were conditions precedent to the enjoyment of the franchise.

The prohibitory laws have deprived the plaintiff of no vested right, nor impaired the obligation of a contract.

Wherefore, the judgment of the circuit court, denying a peremptory *mandamus*, is affirmed.

NELSON JAMES v. THE STATE.

HOMICIDE.

In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases, in order to a conviction, the evidence must produce moral certainty of guilt, to the exclusion of every other hypothesis.

In both civil and criminal cases a verdict may be founded on circumstances alone; and these often lead to a more satisfactory conclusion than direct evidence.

But although circumstantial evidence in a case of assassination, to justify a conviction of murder, should tend to exclude every other supposition but that of guilt, it need not necessarily be such as to render it *impossible* that any other person besides the defendant could have committed the deed.

Forms of entries in records, which are found contained in all the books of authority on the subject, which are deeply seated in the foundations of the law, and which conduce to safety and certainty, ought not to be disregarded when the life or liberty of a human being is at stake. And it is error to pass sentence of death against a person convicted of murder by the verdict of a jury, without the court first asking the defendant if he has anything to offer why such sentence shall not be pronounced.

On such occasion the prisoner has a right to allege grounds for arrest of judgment, plead a pardon, address the court in his own mitigation, or cast himself on its mercy. This opportunity being denied, is sufficient ground for a reversal of the judgment. 1 Bishop's Cr. Pro., § 865, cited and approved.

T. Marshall Miller and *Upton M. Young*, for plaintiff in error.

Legal writers have established the principle, that circumstantial evidence, so seldom of a conclusive nature, is of secondary value, when direct evidence is attainable; by the latter the former is to be tested and measured. It may be assumed as a correct principle, that, if the force of circumstantial evidence in any given case be inferior to that which springs from the *lowest* degree of positive or direct evidence—that is, from the testimony of a single witness—a conviction, certainly in a capital case, will not be sustained. Stark. Ev., 865. With confessions excluded, the defendant stands convicted of murder on circumstantial evidence alone, the legal effect of which

would be far inferior to the testimony of one person present, whom opportunity permitted to witness, directly, the criminal transaction. From the record it could not be affirmed that the circumstantial evidence there presented warrants a conviction in the mind equal to that which the lowest degree of direct evidence would afford.

The circumstances in the case are inconsistent, and do not support the verdict, nor do they exclude every reasonable hypothesis but the one proposed to be established. Nor is this all. The testimony is of a conflicting character. It is evident from both principle and analogy that the law favors the utmost vigilance in the examination of all cases resting purely on circumstantial evidence; nor is the history of criminal jurisprudence, showing so many improper convictions, based on circumstantial evidence alone, wanting in examples tending to support this view. Assuming all to be true which the evidence tends to establish, it is insufficient if some other hypothesis may still be true. Algheri v. State, 25 Miss., 584; 1 Stark. Ev., 572; Cicely v. State, 13 S. & M., 211; McCann v. State, ib., 440. The verdict is not warranted by the evidence. Caleb v. State, 39 Miss., 721; 2 Phil. Ev., 386. Anxiety for the detection of great crimes leads witnesses to exaggeration, and juries to draw rash inferences. Presumptions often arise from circumstances which would not have been noticed but for the accusation itself. Pitts v. State, 43 Miss., 472.

2. The confessions of the prisoner were incompetent, and should have been rejected—they were not voluntary. The circumstances under which a confession is made have much weight in determining its competency. In the case of Cady v. State, 44 Miss., this court said: "Confessions must be voluntary, and not induced by expectation of any advantage held out or promised. 2 East P. C., 659. Confessions induced by means of hope or fear, promises or threats, subsequently made, are presumed to come from the same motives, and are incompetent. Peter v. State, 4 S. & M., 31; 5 Halst., 163; Roscoe Crim. Ev., 30; Simon v. State, 37 Miss., 288; Jordan v. State, 32 Miss., 382; Dick v. State, 30 ib., 593; Serpentine v. State, 1

How., 256. Was the confession free? Let us make an analysis of the testimony. When arrested, and until carried to the body of deceased, defendant asserted his innocence, though the mob constantly accused him of guilt. He had been threatened with death if he did not confess. Two crowds accompanied him to the graveyard—one attempted to take him from the other. They told him it would be better for him to confess. At the burial there was excitement—many colored persons were present; their superstitions were aroused and exerted to obtain a confession—their idea was, that the wound of the dead, touched by a guilty hand, would bleed again. What influence such tests exercised upon the minds of a class entertaining these views is a matter of conjecture—the influence that they *did* exert upon the prisoner, a member of that class, is a matter of evidence. That threats and promises, hopes and fears, with a superstitious influence succeeding, *extorted* the confession, the record demonstrates with almost mathematical precision. The means employed accomplished the result desired. That the confession would not have been made in the absence of the improper influences exerted is evident. The record, studded with facts, supports this conclusion. Subsequent confessions were made soon after, in presence of same parties, and were prompted by same influences. 4 S. & M., 31.

It may be argued that, even if the confessions had been rejected, the circumstantial evidence would still support the verdict. We do not think this is a logical view of the case, for the reason that the jury are supposed to have formed their opinions from the *whole* of the testimony submitted, the confessions included. It could not be affirmed that there would have been a verdict of guilty if the confessions had been rejected by the court below. If the confessions were incompetent, a new trial will be granted, without reference to the strength of the other testimony, and especially would this be true in a capital case resting on purely circumstantial evidence.

4. The prisoner was not asked why judgment of death should not be pronounced.

In all capital cases, where the jury have returned their

verdict guilty, in the presence of the prisoner, he is either immediately, or at a convenient time soon after, asked by the court if he has anything to offer why judgment should not be awarded against him. 4 Blackstone Com., 375; 1 Chit. C. L., 720, 699, 701; 3 Salk., 358; Grady v. State, 11 Ga., 253; 4 Harris (Penn.), 129; 1 Park. Crim. Cases, 474, 476; 2 Hale P. C., 217; Perry v. State, 43 Ala., 21, 24; and cases cited. Bishop's Crim. Pro., § 865. The reason of the rule seems to be founded in natural justice, and upon the right of the defendant to urge, before sentence is pronounced, grounds in arrest of judgment, to plead a pardon, or to address the court and ask for leniency. New trials have been granted upon the statements and explanations of prisoners. They have an absolute right to be heard before sentence in capital cases; and as nothing can be presumed for or against a record except what appears upon its face, the *right* in this case was not accorded.

It has been held in New Jersey that the inquiry mentioned, and the record of it, are necessary in capital cases. West v. State, 2 Zab., 212. In Missouri (State v. Ball, 27 Mo. R., 324) a kindred decision has been made, the court holding that an omission of the inquiry in the record, in a case not capital, is not a fatal error. The logical and legal inference from this view is, that the converse theory would have been entertained had the case in hand been capital. In Pennsylvania the omission has been held to be fatal. 4 Harris, 129. If it be conceded, for the sake of the argument alone, that the defendant had no plea in bar to present, and no ground in arrest of judgment to offer, still his right to address the court, in explanation of his case, remained unimpaired. The reason and spirit of the law in such cases are apparent.

J. S. Morris, attorney-general.

I have carefully examined the record and the elaborate argument of counsel for plaintiff in error, and think there is no error in the record, unless it be that it does not show that the prisoner was asked by the court if he had anything to say why sentence of death should not be passed on him. With this exception, if it be one, there is nothing requiring argument, or

admitting of controversy, here. The evidence, it is true, is mostly circumstantial, and as such, might admit of forensic display before a jury. But the prisoner was ably defended, and the jury properly instructed in the circuit court. I do not controvert any of the legal propositions, or dissent from any of the sentimental abstractions laid down by the prisoner's counsel in respect to the character and value of circumstantial evidence and extra-judicial confessions generally. But it is difficult to find any application for these abstractions in the present case. The law, with suitable instructions as to their duty, commits the fate of the prisoner to the jury selected to try him. The jury has tried him, and their verdict is "guilty." It would not matter if, upon considering the case, this court, on the same evidence, would have found a different verdict. The only question is, Was the verdict of the jury warranted under the evidence? What though the evidence was largely circumstantial; what though there was some sort of partial confession; was the testimony, such as it was, legally sufficient to warrant a conviction? I submit the brief and comprehensive summary of the evidence contained in the transcript as the best argument that can be made. Leave out all confession and all the self-inculpatory statements of the accused, and the verdict must still stand. See Browning v. State, 33 Miss. R., 48; Cicely v. State, 13 S. & M., 211; McCabe v. State, ib., 440.

As to whether it be error that the record does not show that the prisoner was asked if he had aught to say why the death sentence should not be passed on him, I cheerfully submit to this honorable court. In a case of so much moment, I would not deny the accused the smallest privilege accorded to him by the humane principles of the law. If, however, the court should hold that this omission in the record is indeed an error, I submit that even then there will be no occasion for a *venire de novo*, but that all that need be done is to merely set aside the sentence, and let the sentence be made correctly as ought to have been done at first.

PEYTON, C. J.:

At the March term of the circuit court of Warren county,

Nelson James was convicted of the murder of one Jerry Miller, and sentenced by the court to be hung. From this judgment he brings the case here for the revision of this court, and assigns for error:

1. The overruling the defendant's motion for a new trial.

2. The admission of the statement or confession of the defendant as evidence on the trial.

3. Permitting the statement of Ann Miller to go to the jury.

4. That the court erred in not asking the prisoner if he had anything to say why sentence of death should not be pronounced against him.

We shall consider the three first assignments together.

In this case the evidence of guilt, as the record shows, was entirely circumstantial, and whether that was sufficient to sustain the conviction, is the first question to be solved. In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases, it must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis. In both cases a verdict may be well founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce. As mathematical certainty is not attainable in such cases, *moral certainty* is all that the law requires; and even direct testimony, it is said, does not afford grounds of belief of a higher nature. Evidence which satisfies the minds of the jury to this extent, constitutes *full proof* of the fact in question before them. This moral certainty is defined by Chief Justice Shaw, in his charge to the jury in the Webster case, to be a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

Upon a careful examination of the evidence in this case, we think it sufficient to justify the conviction. And although counsel have insisted that the evidence, exclusive of the confessions of the accused, is not sufficient to sustain the conviction, we have not been able to find in this record any confessions of guilt made by the defendant, who, on the contrary, persistently denied having committed the offense.

Jacob Black testified that on Sunday evening after the killing, in company with Gabriel Bowman, he arrested the defendant and took him to Dart's; that another party of several persons came along to take the defendant from him, to carry him before Esquire Ulm; that he finally gave the defendant up to them; they seemed to be very excited; they said if they took him they would make him tell if he killed Jerry Miller; they said they would kill him if he did not tell; one man who made this threat was a constable; this was about dark on Sunday evening; defendant heard the threat; witness was at the burial and saw people take the defendant and put his hand on the dead body, saying you killed him, Nelson, you know you did; Nelson denied all the time when thus accused that he killed Jerry, and said nothing about the shooting; the conduct of these men, though harsh and reprehensible, produced no confession from the defendant of his guilt.

The admission of the statement of Ann Miller as evidence to the jury is assigned for error. This statement was drawn out by way of answer to a question put by the defendant, who asked her "Where were you last night that you let them get my breeches." She said she had gone to her sister-in-law's. He said "that is damnation to me; if it had not been for you, I should not have been in this trouble." If there had been anything in her statement except to give point and meaning to what the defendant said immediately thereafter, it would have been objectionable.

It abundantly appears from the testimony in the case that an unfriendly feeling existed between the defendant and deceased for some time prior to the killing, growing out of the fact that the wife of the deceased was, and had been for some time, living with the defendant.

S. T. Ulm, in his testimony, states that he knew the deceased Jerry Miller and Ann Miller, his wife, and that a feud existed between defendant and deceased about Ann; that some time in the spring, before the killing took place, he heard the defendant say that if the deceased bothered him any more about Ann, he would kill him; that on the preliminary trial before him an old pair of light gray pantaloons were produced, which the defend-

ant said were his; the pants were rolled up wet, and looked as though they had been washed; saw stains on one leg resembling blood.

Alexander Smith, Allen Noble, and Harriet Hardiston testified that the defendant had made in their presence threats that he would kill the deceased, similar to that made in the presence of Ulm.

Jackson Marshall says in his testimony that about 3 or 4 o'clock in the evening of the day of the killing, he met the defendant near his house with a gun, who went into witness's house out of a rain, and fearing the powder may have become wet, he stepped out of the house and fired off his gun, and went into the house again, where he reloaded the gun with slugs and shot; the defendant then left his house and went in the direction of the railroad; about an hour after defendant left witness's house, he heard a gun fire in the direction of the spot where the body of the deceased was found; the report was like that of the gun fired by defendant outside of his door; saw the dead body, and the slugs and shot after they were taken out of the wound; these seemed to be the same sort with which the defendant loaded his gun at his house; witness knew defendant's gun, and said the one in court was the same.

Martha Paul testified that she saw the defendant in the evening of the killing standing under the bridge over the railroad with a gun; she asked him what he was doing there, and he said to her that he was "hunting rabbits;" witness went directly home, and was but a very short time in getting there, and just as she got home, she heard a gun fire in the direction she had come; said that defendant had a little short gun like that exhibited in court.

Jacob Black testified that he was with the deceased at Newman's store at nearly dark on the day he was killed; that it was about a half mile from Newman's store to the place of killing; that the dirt road crosses the railroad on a bridge near the spot; on his way home the deceased would have to cross the bridge; it is something less than a half mile from the bridge to the point where the body was found; from the latter place one could see a person crossing the bridge; there is a deep cut in the direction

of the bridge; a man pursuing the dirt road would come very suddenly upon one at the place of killing.

John Hardiston testified that defendant said that he had loaded his gun with slugs and shot, and that he saw Mr. Newman take slugs and shot out of the wound; that the defendant said that he did shoot off his gun, but that he shot at a rabbit, and if he killed Jerry Miller he did not know it.

Moses Kelly testified that when he got to the graveyard everybody was there but the defendant, and he was going in an opposite direction from the burial ground, but turned and went with the witness and others to the graveyard, and there said that his gun was loaded with slugs and shot, which he shot at a rabbit down on the road, and if he killed Jerry Miller he did not know it; heard the defendant ask Ann Miller "Where were you last night that you let them get my breeches?" she said that she had gone to her sister-in-law's; he then said that is damnation to me; if it had not been for you, I should not have been in this trouble.

James A. Newman in his testimony says that the gun in court is the same that was got at defendant's; and Mr. Dart testified that defendant lived on his place; that there is a cut at the point where the body was found, which would prevent a person on the railroad from seeing one on the dirt road, nor could one on the latter see another upon the former; the locality is favorable for the concealment of one contemplating crime; at the place where the body was found one could easily see another riding across the bridge; at the spot where the body was found the two roads run parallel, the railroad running through a cut; the bank there is about four feet high.

The previous threats, the antecedent grudge, and lying in wait with a gun loaded with slugs, are evidences of malice and of a deadly purpose, and together with the other circumstances detailed in the evidence, point to the plaintiff in error as the guilty agent, and establish his guilt beyond a reasonable doubt. For circumstantial evidence, to be sufficient for conviction, should tend to exclude every other supposition inconsistent with the defendant's guilt; but it need not necessarily be such as to show it to be *impossible* that any other person could have committed

the crime. There is nothing in the three first assignments of error to justify this court in reversing the judgment in this case.

This brings us to the fourth assignment of error, which presents the question whether it is necessary, in passing sentence of death, that the court should previously ask the prisoner if he has anything to say why judgment should not be pronounced against him. This is the first time, so far as we know, that this question has been presented for the adjudication of this court.

This seems to be required by the highest authorities, such as Hale, Hawkins, Blackstone, Chitty, and Archbold, and the absence of which was ruled, in Rex v. Geary, 2 Salk., 630, and King v. Speke, 3 Salk., 358, to be fatal. And we find it contained in all the books of entries and forms, so far as we have been able to examine them. As these forms of records are deeply seated in the foundations of the law, and as they conduce to safety and certainty, they surely ought not to be disregarded when the life or liberty of a human being is in question.

In the above cited case of The King v. Geary, in 2 Salkeld, Geary was attainted of high treason, on an indictment to which he pleaded not guilty. Upon a writ of error brought to reverse the attainder, the exception was taken, that it did not appear from the record that he was asked what he had to say why judgment should not be given against him. And the court held the exception good; for he might have a pardon or other matter to move in arrest of judgment. And in New York, in the case of Safford v. The People, 1 Parker's Cr. Cases, 476, the court say: "By the record, as certified to us, it does not appear that the court demanded of the defendant what he had to say why judgment should not be pronounced against him. This undoubtedly was necessary; and it seems, it must appear by the record to have been done." And this is recognized by the court in New Jersey, in the case of West v. The State, 2 Zabriskie, 222, as the correct doctrine; as also in the state of Georgia, in the case of Grady v. The State, 11 Georgia, 257. And it has been held in Pennsylvania, that upon a conviction for murder in the first degree, it should appear from the record that the prisoner was present in court

when he was sentenced to be executed, and that he was asked if he had anything to say why sentence of death should not be pronounced upon him. Hamilton alias Thacker v. Commonwealth, 4 Harris, 129. And so in Alabama, in the case of Perry v. The State, 43 Ala., 22. This principle of law has its foundation in good sense and common justice, and applies in all capital cases.

Mr. Bishop, in a thorough examination of the English and American doctrine upon this subject, says: "It is now indispensably necessary, even in clergyable felonies, that the defendant should be asked by the court, if he has anything to say why judgment of death should not be pronounced on him; and it is material that this appear upon the record to have been done; and its omission will be a sufficient ground for reversal of the judgment. On this occasion he may allege any ground in arrest of judgment; or plead a pardon, if he has obtained one. If he has nothing to urge in bar, he may address the court in mitigation of his conduct, or cast himself upon their mercy." 1 Bishop's Cr. Pr., sec. 865.

Blackstone says: "When upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner, he is either immediately, or at a convenient time soon after, asked by the court if he has anything to offer why judgment should not be awarded against him." 4 Comm., 375. And in the appendix to that volume, he has given a record of an indictment and conviction of murder, which might aid clerks in making up such records, if they were disposed to read it and avail themselves of it.

For the reason, that it does not appear from the record that the plaintiff in error was asked by the court if he had anything to say why judgment of death should not be pronounced on him, the judgment will be reversed, and the cause remanded for the further action of the court below, in accordance with this opinion. The verdict stands as it is.

NED GAITER v THE STATE.

In criminal cases the record should show distinctly, leaving as little as possible to inference or presumption, all the proceedings in the several stages of the prosecution, trial, and sentence.

The record in a capital case being silent as to all the intermediate dates between the 9th and 24th of the month, at one term; and between the 14th of one month and 5th of the next, at another; and failing to show distinctly that the grand jury was organized; or that the grand jury presented the indictment; or that the prisoner was present in proper person at the trial; or that, after being found guilty of murder, was asked if he had anything to say why sentence of death should not be pronounced against him, is so defective as to vitiate a conviction and entitle the prisoner to a new trial.

Error to Warren criminal court. OSGOOD, J.

The facts appear in the opinion of the court.

Smith & Clifton and *White & Farish*, for plaintiff in error, Cited 3 How. 27; 25 Miss., 589; 2 Ga., 421; 26 Miss., 362; 44 Miss., —; ib., —; 1 Bish. Cr. Pr., 684; 8 S. & M., 722; 6 Barr, 384; 9 Leigh, 623; 4 Bl. Com., 375; 1 Chitty's Cr. L., 699–701, 720; Archb. Cr. Pr., 180; 1 Bish. Cr. Pr., 865; 3 Mod., 265; 2 Zab., 212; 4 ib., 455; 4 Harris, 129; 1 Parker Cr. R., 474; 43 Ala., 21–53. And argued the same points presented in the opinion of the court.

J. S. Morris, attorney-general.

As to the organization of the grand jury, see Rev. Code, p. 499, art. 131; ib., p. 613, art. 250; Easterling v. State, 35 Miss., 210.

There is a recital in the record, that "the grand jury were empaneled and sworn." Frank v. State, 39 Miss., 705; 9 Ga. R., 58; Terrell v. State, Whar. Am. Cr. L. (6th ed.), §§ 3043–4–5.

The issue was sufficiently joined by the plea of not guilty. Whar. Am. Cr. Law (6th ed.), § 530; United States v. Gilbert, 2 Sumner, 20.

TARBELL, J.:

The plaintiff in error, having been tried in the criminal court of Warren county, on a charge of murder, whereof he was convicted and sentenced, brings his case to this court for review.

The errors assigned are based upon defects in the record, and are as follows: 1. That the grand jury was not legally organized; 2. That the record does not show that the plaintiff in error was present in court during the several stages of the trial; 3. That the record does not show that the accused was asked before sentence, if he had anything to say why sentence of death should not be pronounced against him, and for other reasons, &c.

The record in this case is certainly very defective, and the verdict can be sustained only by constructions and intendments which ought not to be indulged in a criminal case, involving the life of a party.

From the organization of the court, on the 9th day of November, 1869, to the 24th day of the same month, on which day the indictment was filed, no intermediate date is given as to any of the orders or transactions of the court in reference to this case. The trial being postponed, the record states that the court again convened on the 14th day of February, 1870. In this case a special *venire* was called, jurors fined, a motion to quash the indictment was overruled, a trial had, a motion for a new trial overruled, a motion in arrest of judgment denied, and sentence pronounced, without showing the date of those proceedings, all of which occurred between the opening of the court on the 14th day of February and the 5th day of March, 1870, when the bill of exceptions was signed.

Without giving the date of the order, it is stated by the record, that. "It appearing to the court that no grand jury has been selected by the board of police for the present term of this court, it is ordered, in accordance with the statute in such cases, that the sheriff of the county do select and summon from the county aforesaid twenty good and lawful men thereof, householders and freeholders thereof, and citizens of the United States, to be and appear here before this court, *instanter*, then and there to serve as grand jurors for the November term A. D. 1869 of this court." It is then stated that "Thereupon, in obedience to said command aforesaid, the sheriff aforesaid summoned the following good and lawful men of his county, to wit: A. H. Arthur, foreman," and nineteen others, whose names are

given. The next statement is that three of the persons so summoned were excused from service on the grand jury.

Then follows this entry: "This day the grand jury duly empaneled and sworn for the present term of this court. Thereupon their foreman, A. H. Arthur, Esq., returned into court here several indictments, each indorsed thereon 'A true bill,'" &c. Then this: "Among said indictments was the following, in words and figures as follows." The indictment being given, the clerk certifies it to have been filed November 24, 1869. It will be seen that, except by a forced construction and liberal intendments, the grand jury was not duly empaneled. It is stated, by way of recital, that it had been previously done; but there is no direct statement of the organization of the grand jury on the day when it occurred. A literal reading of the record shows the indictment to have been presented by the foreman and not by the grand jury through him.

On a day not given, the record states that "This day came the district attorney, for and on behalf of the state, as well as the said defendant by his attorneys, and the said defendant by his attorneys moves the court to quash the indictment herein," but the grounds of this motion are not shown, and it was overruled. Then follows an entry of the trial, and at its conclusion it is added, "And the said defendant is remanded to jail."

If these occurrences all transpired on the same day, it is possible the accused was in court when the motion to quash the indictment was submitted, though the record asserts affirmatively that he appeared on that occasion by counsel. As it is altogether probable the trial occupied several days, the entry at its termination that the defendant was remanded to jail cannot cure the defect.

The record of the motion in arrest of judgment states it to have been made by attorney, without any entry upon which to found even a forced presumption of the presence of the prisoner in court.

The record also wholly neglects to show that before sentence the accused was asked if he had anything to say why sentence of death should not be pronounced upon him, which we have held in another case at this term should appear, though this

alone does not entitle the party to a new trial. A bill of exceptions appears to the refusal of the court to arrest the judgment, but no testimony is sent up.

We are unwilling, in a case of life and death, to sustain a verdict upon a record so full of defects as this, requiring, as it does, in all its parts, constructions, and intendments, directly contrary to the ordinary and literal meaning of the language used. In criminal cases the record should leave as little as possible to construction and presumption, because in such cases there is little that is not matter of substance. We have reached the conclusion to send the case back for a new trial.

The judgment is therefore reversed, the cause remanded, and a *venire de novo* awarded.

APPENDIX:

CONTAINING

PRECEDENTS AND FORMS

OF

INDICTMENTS AND PLEAS,

AND

FORMS OF ENTRIES FOR MINUTES AND FINAL RECORDS

IN

CRIMINAL PROCEDURE.

These forms of Entries in Records are found in the books of authority; they are deeply seated in the foundations of the Law; they conduce to safety and certainty; and they ought not to be disregarded when the life or liberty of a human being is brought in question.—Chief Justice Peyton.

APPENDIX.

PRECEDENTS OF CRIMINAL PLEADINGS.

Form I.

INDICTMENTS.

General Frame.

The State of Mississippi,[1] *County, ss.:*

In the circuit court (or criminal court) for county, at the term, in the year of our Lord one thousand eight hundred and seventy .

The grand jurors for the state of Mississippi [taken from the body of good and lawful men of county],[2] elected, empaneled, and sworn to inquire in and for the said county of , at the term of aforesaid, upon their oaths present, &c.

Conclusion of Common Law Offense.

Against the peace and dignity of the state of Mississippi.[3]

Conclusion for Statutory Offense.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Mississippi.

[1] It is not essential that there should be a formal statement of a finding by the authority of the state. It is enough if it appear from the record that the prosecution is in the name of the state. Greeson v. State, 5 How., 33; Woodsides v. State, 2 How., 33.

[2] The words in brackets may be omitted. Woodsides v. State, 2 How., 655. See Greeson v. State, 5 How., 32.

[3] An indictment beginning "The state of Mississippi," and concluding "against the peace and dignity of the state of Mississippi," is sufficiently precise. State v. Johnson, Walker, 392.

FORM II.

ACCESSORIES.

Against Accessory before the Fact together with the Principal.

(After charging the principal with the offense, and immediately before the conclusion of the indictment, charge the accessory thus):

And the jurors aforesaid, upon their oaths aforesaid, do further present, that A. B., late of the county aforesaid, the said [*offense*] was committed in form aforesaid, to wit, on, &c., at, &c., aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said A. C. the said [*offense*] in manner and form aforesaid to commit. (Conclude as form I, *supra*.

FORM III.

Indictment against Accessory before the fact, the Principal being convicted.

(Commence as in form I *supra, and then charge*), that heretofore, to wit, at a session of the circuit (*or criminal*) court of county, began and held within and for said county at the court-house thereof, &c., &c. (*so continuing the caption of the indictment against the principal*), it was presented upon the oaths of, &c., that one A. C., late of, &c. (*continuing the indictment to the end, reciting it, however, in the past tense, and not in the present*), upon which said indictment the said A. C., at the court aforesaid, was duly convicted of the (*felony and larceny*) aforesaid, as by the record thereof more fully and at large appears. And the jurors aforesaid, upon their oaths aforesaid, do further present, that A. D., late of the county aforesaid, laborer, before the said (*felony and larceny*) was committed in form aforesaid, to wit, on the day of , in the year aforesaid, at the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire and command the said A. C., the said (*felony and larceny*) in manner and form aforesaid to do and commit; against the peace, &c. (*as ordinarily*).

FORM IV.

Against Accessory after the fact with the Principal.

(After stating the offense of the principal, and immediately before the conclusion of the indictment, charge the accessory after the fact, thus): And the jurors aforesaid, upon their oaths aforesaid, do further present that J. W., late of the county aforesaid, laborer, well knowing the said J. S. to have done and committed the said *(felony and larceny)* in form aforesaid, afterwards, to wit, on the day and year aforesaid, in the county aforesaid, him the said J. S. did feloniously receive, harbour, and maintain. (*Conclude as ordinarily*).

FORM V.

Against Accessory after the fact, the Principal being Convicted.

(Proceed as in precedent of indictment against, accessory before the fact the prisoner being convicted, Form III. to the asterisk, and then thus:) And the jurors aforesaid, upon their oaths aforesaid, do further present that J. W., late of the county aforesaid, laborer, well knowing the said J. S. to have done and committed the *(felony and larceny)* aforesaid, after the same was committed, as aforesaid, to wit, on the day and year aforesaid, at, to wit, the county aforesaid, him, the said J. S., did feloniously receive, harbour and maintain, against the peace, &c. (*as ordinarily*).

FORM VI.

MURDER.

General Frame under the Statute. Rev. Code, 615, Art. 265.

That A. B., late of the county aforesaid, did, on the 1st day of September, in the year of our Lord, one thousand eight hundred and seventy , wilfully, feloniously, and of his malice aforethought, kill and murder C. D., against, &c. (*as ordinarily*).

GENERAL FORMS AT COMMON LAW.

FORM VII.

By Shooting with a Pistol.

That A. B., of, &c., yeoman, on , with force of arms, at , in the county aforesaid, in and upon the body of one C. D., in the peace of said commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said A. B., a certain pistol of the value of two dollars, then and there charged with gunpowder and one leaden bullet, which said pistol, he the said A. B. in his right hand then and there had and held, then and there feloniously, wilfully, and with malice aforethought, did discharge and shoot off, to, against and upon the said C. D.; and that the said A. B., with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said A. B. discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound him, the said C. D., in and upon the right side of the belly of him the said C. D., giving to him, the said C. D., then and there, with the bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said A. B., in and upon the right side of the belly of him the said C. D., one mortal wound of the depth and of the breadth of half an inch; of which said mortal wound he, the said C. D., then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said A. B., him the said C. D., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder.

FORM VIII.

Against Principal in the First, and Principal in the Second Degree, for Shooting with a Pistol.

That T. P. K., late of the said county of Monroe, laborer, and C. D., late of the county of Monroe, laborer, not having the fear

of God before their eyes, but being moved and seduced by the instigation of the devil, on the fifth day of October, in the year of our Lord eighteen hundred and thirty-five, with force and arms, at the county of Monroe, in and upon one P. S. * * * * * in the peace of God and in the said state of Alabama then and there being, feloniously, wilfully, and with malice aforethought did make an assault; and that the said T. P. K., a certain pistol of the value of ten dollars, then and there loaded and charged with gunpowder and twenty leaden bullets, commonly called buckshot, which pistol he, the said T. P. K., in his right hand then and there had and held, to, against, and upon the said P., then and there feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said T. P. K., with the leaden bullets aforesaid, out of the pistol aforesaid, then and there, by force of gunpowder, shot and sent forth as aforesaid, the aforesaid P., in and upon the buttocks of him the said P., a little above the rectum of him the said P., then and there, feloniously, wilfully, and of his malice aforethought, did strike, penetrate and wound, giving to the said P. then and there, with the leaden bullets aforesaid, commonly called buckshot, as aforesaid, so as aforesaid shot, discharged, and sent forth out of the pistol aforesaid, by the said T. P. K., a little above the rectum of him the said P., one mortal wound of the depth of sixth inches and of the breadth of half an inch, of which said mortal wound the said P., from the said fifth day of October, in the year of our Lord eighteen hundred and thirty five, until the thirteenth of the same month of October, in the year last aforesaid, in the county aforesaid, did languish, and languishing did live; on which thirteenth day of October, in the year last aforesaid, the same P., at the county aforesaid, of the mortal wound aforesaid, died; and that the aforesaid D. C., then and there feloniously, wilfully, and of his malice aforethought, was present, aiding, helping, abetting and comforting, assisting and maintaining the said T. P. K., the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said T. P. K. and the said C. D., the said P. then and there, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of.

FORM IX.

Murder by Poisoning. First Count. With Arsenic, in Chicken Soup.

The grand jury of the state of , inquiring for the body of the county of , upon their oaths, do present that L. C., late of the county aforesaid, widow, and J. C., late of the county aforesaid, yeoman, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, and of their malice aforethought, contriving and intending a certain W. C. to deprive of his life, and him, the said W. C., feloniously to kill and murder, on, &c., and on divers other days and times between the said day of June, in the year last aforesaid, and the day of , the same year, with force and arms, at the county aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, feloniously, and of their malice aforethought, mix and mingle certain deadly poisons, called arsenic, in certain chicken soup, which had been, at divers days and times during the time aforesaid, prepared for the use of the said W. C., to be drunk by him the said W. C. (they, the said L. C. and the said J. C., then and there well knowing that the said chicken soup with which they, the said L. C. and the said J. C., did so mix and mingle the said deadly poisons as aforesaid, was then and there prepared for the use of the said W. C., with intent to be then and there administered to him for his drinking the same), and the said chicken soup with which the deadly poison was so mixed as aforesaid, afterwards, to wit, on, &c., and on the said other days and times last mentioned, at the county and within the jurisdiction aforesaid, was delivered to the said W. C., to be then and there drunk by him, the said W. C. (not knowing that said poison to have been mixed with said chicken soup), did, afterwards, to wit, on, &c., and on the said other days and times above mentioned, there drink and swallow down into his body several quantities of the said deadly poison so mixed as aforesaid with the said chicken soup, and the said W. C., of the poison aforesaid, and by the operation thereof, then and there became sick and greatly distempered in his body, of which said sickness and distemper of body, occasioned by said drinking, taking and swallowing down into the body of the said W. C. of the deadly poisons aforesaid, so mixed and mingled in the said chicken soup as aforesaid, he, the

said W. C., from the said several days and times on which he had so taken, drunk and swallowed down the same as aforesaid, until, &c., aforesaid, at, &c., aforesaid, and within the jurisdiction aforesaid, did languish, and languishing did live, on, &c., aforesaid, at the county and within the jurisdiction aforesaid, he, the said W. C., of the poison aforesaid, so taken, drunk and swallowed down as aforesaid, and of the said sickness and distempers occasioned thereby, did die. And so the jury aforesaid, upon their oaths aforesaid, do say, that the said L. C. and the said L. A. E., him, the said W. C., then and there, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, contrary, &c., and against, &c.

SAME.

Second Count. Against one Defendant as Principal in the First, and the other as Principal in the Second Degree.

And the jury aforesaid, upon their oaths aforesaid, do further present, that the said L. C., not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought wickedly contriving and intending the said W. C. to deprive of his life, and the said W. C. feloniously to kill and murder, on, &c., and on divers other days and times between, &c., aforesaid, and, &c., the same year, with force and arms, at, &c., aforesaid, and within the jurisdiction of this court, did feloniously, wilfully, and of her malice aforethought, mix and mingle certain deadly poison, called arsenic, in certain chicken soup, which had been at divers days and times during the time aforesaid prepared for the use of the said W. C., to be drunk by him the said W. C. (she, the said L. C., then and there well knowing that the said chicken soup with which she, the said L. C., did so mix and mingle the said deadly poison as aforesaid, was then and there prepared for the use of the said W. C., with intent to be then and there administered to him for his drinking the same), and the said chicken soup with which the said deadly poison was so mixed as aforesaid, afterwards, to wit, on, &c., and on, &c., last mentioned, at the county and within the jurisdiction aforesaid, was delivered to said W. C., to be then and there drank by him the said W. C., and the said W. C. (not knowing the said poison to have been mixed with

the said chicken soup) did afterwards, to wit, on, &c., aforesaid, and on the said divers other days and times above mentioned, there drink and swallow down into his body several quantities of the said deadly poison, so mixed as aforesaid with the said chicken soup; and the said W. C., of the poison aforesaid, and by the operation thereof, then and there became sick and greatly distempered in his body, of which said sickness and distemper of body, occasioned by the said drinking, taking and swallowing down into the body of the said W. C. of said deadly poison aforesaid, so mixed and mingled in the said chicken soup as aforesaid, he, the said W. C., from the said several days and times on which he had so taken, drunk and swallowed down the said deadly poison as aforesaid, until, &c., aforesaid, at, &c., aforesaid, and within the jurisdiction aforesaid, did languish, and languishing did live; on which, &c., at, &c., aforesaid, and within the jurisdiction aforesaid, he, the said W. C., of the poison aforesaid so drunk and swallowed down as aforesaid, and of the said sickness and distemper occasioned thereby, did die. And that the said L. A. E. M. then and there feloniously, wilfully, and of his malice aforethought, was present, aiding and abetting the said L. C., the felony and murder aforesaid, in manner and form last aforesaid, to do and commit. And so the jury aforesaid, upon their oaths aforesaid, do say, that the said L. C., and the said L. A. E. M., him the said W. C. then and there, in the manner and form last aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, contrary, &c., and against, &c.

SAME.

Third Count. Against one as Principal, and the other as Accessory before the Fact.

And the jury aforesaid, upon their oaths aforesaid, do further present that the said L. C., not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought, contriving and intending a certain W. C. to deprive of his life, and the said W. C. feloniously, wilfully, and of her malice aforethought to kill and murder with poison, on, &c., and on divers other days and times, between, &c., aforesaid, and, &c., aforesaid, with force and arms, at, &c., aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, felo-

niously, and of her malice aforethought, mix and mingle certain deadly poison, called arsenic, in certain chicken soup, which had been at divers days and times, during the time aforesaid, prepared for the use of the said W. C., to be drunk by him, the said W. C. (she, the said L. C., then and there well knowing that the said chicken soup with which she, the said L. C., did so mix and mingle the deadly poison as aforesaid, was then and there prepared for the use of the said W. C., with intent to be then and there administered to the said W. C. for his drinking the same); and that the said W. C. afterwards, to wit, on, &c., aforesaid, and on the said other days and times last mentioned, at, &c., aforesaid, and within the jurisdiction aforesaid, did take, drink, and swallow down into his body several quantities of the said chicken soup, with which the said arsenic was so mixed and mingled by the said L. C. as aforesaid (he, the said W. C., at the time he took, drank, and swallowed down into his body the said chicken soup, not knowing that there was any arsenic or any other poisonous or hurtful ingredient mixed or mingled with the said chicken soup), by means whereof he, the said W. C., then and there became sick and greatly distempered in his body, and the said W. C., of the poison aforesaid, so by him taken, drunk, and swallowed as aforesaid, and of the sickness occasioned thereby, from the said several days and times on which he, the said W. C., had so taken, drunk, and swallowed down the same deadly poison as aforesaid, until, &c., aforesaid, at, &c., aforesaid, and within the jurisdiction aforesaid, did languish, and languishing did live; on which said, &c., at, &c., aforesaid, and within the jurisdiction aforesaid, he, the said W. C., of the poison aforesaid, so by him taken, drunk, and swallowed down, and of the sickness and distemper occasioned thereby, did die.

And that the aforesaid L. A. E., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, before the said felony and murder, to wit, on, &c., at, &c., aforesaid, and within this jurisdiction of the court, with force and arms, feloniously, wilfully, and with malice aforethought, did incite, instigate, stir up, counsel, direct, advise, command, aid, abet, move, and procure her, the said L. C., the felony and murder aforesaid, in manner and form aforesaid, to do and commit.

And so the jury aforesaid, upon their oaths aforesaid, do say that the said L. C., him, the said W. C., then and there, in manner and form last aforesaid, feloniously, wilfully, and of her malice

aforethought, did kill and murder; and that he, the said L. A. E., feloniously, wilfully, and of his malice aforethought, in manner and form aforesaid, at, &c., aforesaid, and within the jurisdiction of this court, her, the said L. C., did aid, abet, counsel, direct, advise, and instigate the felony and murder aforesaid, in manner and form aforesaid, to commit and perpetrate, contrary, &c., and against, &c.

FORM X.

Murder by giving the deceased Poison, and thereby aiding her in Suicide.

That B. A., on, &c., at, &c., upon E. C. "feloniously, wilfully, and of his malice aforethought did make an assault, and feloniously, wilfully, and of his malice aforethought, did give and administer to her two ounces weight of a deadly poison called laudanum, with intent that she should take and swallow the same down into her body (he knowing the same to be a deadly poison); and that the said E. C. the said laudanum so administered did take and swallow down into her body, and by reason thereof became mortally sick and distempered in her body, and of such mortal sickness and distemper then and there died."

FORM XI.

Murder by Stabbing with a Knife.

That A. B., late, &c., on, &c., with force and arms, at, &c., aforesaid, in the county aforesaid, in and upon one J. M., in the peace of God of the said state then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that he, the said A. B., with a certain knife of the value of sixpence, which he, the said A. B., in his right hand then and there had and held, the said J. M., in and upon the left side of the belly, between the short ribs of him, the said J. M., one mortal wound of the breadth of three inches, and of the depth of six inches, of which said mortal wound the said J. M., from, &c., until, &c., at, &c., aforesaid, in the county aforesaid, did languish, and languishing did live; on, &c., aforesaid, the said J. M., at, &c., aforesaid, of the said mortal wound died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said A. B., him the said J. M., in the manner and by the means aforesaid, feloniously, wilfully, and of

his malice aforethought, did kill and murder, contrary, &c., and against, &c.

FORM XII.

Murder in a Duel fought without the State.

The jurors, &c., upon their oaths present that A. B., being an habitant of this state, to wit, of, &c., in the county of S. and state aforesaid, gentleman, by a previous appointment and engagement made within this state, to wit, at, &c., and state aforesaid, on, &c., with one C. D. to fight a duel without the jurisdiction of this state, to wit, at, &c., did afterwards, to wit, on, &c., aforesaid, with force and arms, at, &c., aforesaid, in and upon the said C. D., feloniously, wilfully, and of his malice aforethought, make an assault; and that the said A. B. a certain pistol, then and there charged with gunpowder, and one leaden bullet, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said C. D.; and that the said A. B., with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said A. B. discharged and shot out of the said pistol, as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound the said C. D. with the leaden bullet aforesaid, so as aforesaid discharged and shot of the pistol aforesaid by the said A. B., in and upon the right side of the belly of the said C. D., one mortal wound of the depth of four inches and the breadth of one inch, and of which mortal wound the said C. D., on and from, &c., day of June, in the year aforesaid, until, &c., within this state, to wit, at, &c., aforesaid, did suffer and languish, and languishing did live, and afterwards, to wit, on, &c., at, &c., aforesaid, of the mortal wound aforesaid died. And so the jurors aforesaid upon their oath aforesaid, do say that the said A. B., him and the said C. D. then and there, &c.

FORM XIII.

RAPE.

General Form.

That J. S., late of the county of M., on the day of, &c., with force and arms at, to wit, the county of , in and upon

one A. N., in the peace of God and the said state, then and there being, violently and feloniously did make an assault, and her the said A. N. then and there forcibly and against her will did ravish and carnally know, against, &c.

FORM XIV.

For carnally knowing and abusing a Woman Child under the age of ten years.

The jurors, &c., upon their oaths present that C. D., late of the county of S., laborer, on the first day of June, in the year of our Lord, &c., with force and arms, in the county aforesaid, in and upon one E. F., a woman child under the age of ten years, to wit, the age of nine years, feloniously did make an assault, and her the said E. F. then and there feloniously did unlawfully and carnally know and abuse, against, &c.

FORM XV.

Abusing Female Child with her consent, under Ohio Statute, 48, § 2.

That A. B., on the day of , in the year of our Lord one thousand eight hundred and , in the county of aforesaid, being then and there a male person of the age of seventeen years and upward, in and upon one M. M., a female child under the age of ten years, to wit, of the age of eight years, then and there being, unlawfully, forcibly, and feloniously did make an assault, and her the said M. N. then and there unlawfully and feloniously did carnally know and abuse, with her consent, contrary, &c.

FORM XVI.

SODOMY.

General Form.

That A. B., on, &c., at, &c., in and upon one E. L., then and there being, feloniously did make an assault, and then and there feloniously, wickedly, diabolically, and against the order of nature,

had a venereal affair with the said E. L., and then and there carnally knew the said E. L., and then and there feloniously, wickedly, and diabolically, and against the order of nature, with the said E. L. did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians), to the great displeasure of Almighty God, to the great scandal of all human kind, against, &c.

FORM XVII.

MAYHEM.

Indictment for Mayhem, by Slitting a Nose, and against the Aider and Abettor.

That J. W., late, &c., laborer, and A. J., late of, &c., Esq., on, &c., contriving and intending one E. C. to maim and disfigure, at, &c., with force and arms, in and upon the said E. C., in the peace of God and said state, then and there being, on purpose, and on (*or* of their) malice aforethought, and by lying in wait, unlawfully and feloniously did make an assault, and the said J. W., with a certain iron bill of the value of one penny, which he, the said J. W., in his right hand then and there held, the nose of the said E. C., on purpose, and of his malice aforethought, and by lying in wait, then and there unlawfully and feloniously did slit, with intention the said E. C., in so doing, in manner aforesaid, to maim and disfigure; and that the aforesaid A. J., at the time the aforesaid felony by the said J. W., in manner and form aforesaid was done and committed, to wit, on the said, &c., at, &c., with force and arms, on purpose, and of his malice aforethought, and by lying in wait, unlawfully and feloniously was present (knowing of and privy to the said felony) aiding and abetting the said J. W. in the felony aforesaid, in manner and form aforesaid done and committed. And so the jurors, &c., do say that the said J. W. and A. J., on the said, &c., at, &c., aforesaid, with force and arms, on purpose, and of their malice aforethought, and by lying in wait, the felony aforesaid, in form aforesaid, unlawfully and feloniously did do and commit, and each of them did do and commit, against, &c., and against, &c.

FORM XVIII.

Second Form for Same.

That C. D., late of B., in the county of S., laborer, on the day of , &c., with force and arms, at, &c., in the county of, &c., aforesaid, the said C. D. being then and there armed with a certain dangerous weapon, to wit, a knife, with malicious intent the said J. N. then and there to maim and disfigure, in and upon the said J. N. feloniously did make an assault; and that the said C. D., with the said knife, the nose of the said J. N. then and there feloniously and maliciously did cut and slit, with malicious intent then and there and thereby, in manner aforesaid, the said J. N. then and there to maim and disfigure, against, &c., and contrary, &c.

FORM XIX.

Biting off an Ear.

That defendant, on, &c., at, &c., unlawfully, and on purpose, did bite off the left ear of one J. W., contrary, &c.

FORM XX.

Maliciously Breaking an Arm with Intent to Maim.

That (*the defendant*), with force and arms, in and upon one J. D. did make an assault, and upon the left arm of him, the said J. D., with a certain stick, which he, the said defendant, then and there held in both his hands, did strike and break, and did on purpose and of his malice aforethought, unlawfully disable the left arm of him the said J. D., with intent him the said J. D. then and there to maim, contrary, &c., and against, &c.

FORM XXI.

ABDUCTION.

That J. A., late of the county of B., laborer, on, &c., at, &c., with force and arms, in and upon one J. T., in the peace of God and said state, then and there being, feloniously did make an

assault, and her, the said J. T., then and there did take against her will, with the intent to compel her by force, menace and duress to be defiled (*or* "to be married to the said," &c.), and other wrongs to the said J. T. then and there did, to the great damage of the said J. T., against, &c., and contrary, &c.

FORM XXII.

ABORTION.

That A. B., late of, &c., laborer, A. C., late of, &c., single woman, and A. D., late of, &c., yeoman, on, &c., with force and arms, &c., at the county aforesaid, and within the jurisdiction of the said court, in and upon one A. E., then and there being big, pregnant, and quick with child, did make a violent assault, and her the said A. E. then and there did violently bruise, wound and ill-treat, so that her life was despaired of, and a certain instrument, made of silver and other metal, in the shape and form of a hook, up and into the womb and body of the said A. E. then and there violently, wickedly, and inhumanly did force and thrust, with a wicked intent, to cause and procure the said A. E. to miscarry, abort, and to bring forth the said child, of which she was big, quick, and pregnant as aforesaid, dead, and to kill and murder the said child, by reason and means of which said last-mentioned premises, the said child was killed, and its life destroyed and taken away in its mother's womb; and she, the said A. E., afterwards, to wit, on, &c., miscarried and was aborted and delivered of the said child, being a female child, and being at the time of its birth dead, to the great injury and detriment of the said A. E., to the evil of all others in like manner offending, and against, &c.

Same. Second Count.

That the said A. B., A. C., and A. D. aforesaid, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of the said court, in and upon the said A. E., then and there being big and pregnant with a certain other child, did make another violent assault, and a certain other in the shape and form of a hook, up and into the womb and body of the

said A. E., then and there violently, wickedly, and inhumanly did force and thrust, with a wicked intent to cause and procure the said A. E. to miscarry, and to bring forth the said child of which she was big and pregnant, as last aforesaid, dead, by reason and means of which said last-mentioned premises, she, the said A. E., afterwards, to wit, &c., miscarried, and was delivered of the said child, being a female child, the said child being dead at the time of delivery, to the great injury and detriment of the said A. E.; to the evil example of all others in like manner offending, and against, &c.

Same. Third Count.

That the said A. B., A. C., and A. D. aforesaid, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of the said court, in and upon the said A. E., then and there being pregnant with a certain other child, did make another violent assault, and a certain other instrument, made of silver or other metal, in the shape and form of a hook, up and into the womb and body of the said A. E., then and there violently, wickedly, and inhumanly did force and thrust, with a wicked intent, to wit, to cause and procure the said A. E. to miscarry, and to bring forth the said child of which she was big and pregnant, as last aforesaid, dead, to the great injury and detriment of the said A. E., to the evil example of all others in like manner offending, and against, &c.

FORM XXIII.

Assault on a Woman with Quick Child, so that the Child was brought forth dead. (*At Common Law.*)

That A. B., on, &c., at, &c., in and upon one E., the wife of one C. W., then and there being big with a quick child, did make an assault; and her, the said E., then and there did beat, wound, and ill-treat, so that her life was greatly despaired of, by reason whereof, she, the said E., afterwards, to wit, on, &c., at, &c., did bring forth the said child dead, and other wrongs to the said E., then and there did, against, &c. (*Conclude as in ordinary cases.*)

FORM XXIV.

Administering a Potion, with intent to produce Abortion. (*At Common Law.*)

That A. B., of, &c., in the county of , laborer, on, &c., at B. aforesaid, in the county aforesaid, did unlawfully and wickedly administer to, and cause to be administered to and taken by one C. D., single woman, she, the said C. D., being then and there pregnant and quick with child, divers quantities, to wit, four ounces, of a certain noxious, pernicious, and destructive substance called *savin;* with intent thereby to cause and procure the miscarriage of the said C. D., and the premature birth of the said child, of which the said C. D. was then and there pregnant and quick; by the means whereof, the abortion, miscarriage, and premature birth of the said child was caused and produced. And she, the said C. D., afterwards, to wit, on, &c., next following, at B. aforesaid, in the county aforesaid, by means of the noxious, pernicious, and destructive substance aforesaid, so as aforesaid administered by the said A. B., and taken by the said C. D., was prematurely delivered of the said child, against, &c.

FORM XXV.

ASSAULT.

Indictment for a Common Assault.

That A. B., late of, &c., on, &c., with force and arms, in and upon one C. D., in the peace of God and said state, then and there being, did unlawfully and wilfully make an assault; and him, the said C. D., did then and there beat, wound, and ill-treat, and other wrongs to the said C. D. then and there did, against the peace, &c.

FORM XXVI.

Assault without Battery.

That A. B., of in the county of , laborer, on, &c., with force and arms, at, &c., in the county aforesaid, in and upon one C. D. (in the peace of said state, then and there being),

with a very offensive weapon called a cane, did make an assault, and other wrongs to the said C. D. then and there did and committed to the great injury of him, the said C. D., and against, &c.

FORM XXVII.

Threatening in a Menacing Manner.

That A. B., on, &c., in the county of aforesaid, designing and intending one A. C., then and there being, in great bodily fear to put him the said A. C., then and there did unlawfully and maliciously threaten, in a menacing manner.

FORM XXVIII.

Assault and Encouraging a Dog to Bite.

That A. B., in the county aforesaid, laborer, on, &c., now last past, at, &c., aforesaid, in the county aforesaid, in and upon one C. D. an assault did make, and him the said C. D., did then and there beat, wound, and abuse, and that the said A. B. did then and there unlawfully incite, provoke, and encourage a certain dog, belonging to him the said A. B., him the said C. D. then and there to beset and bite; by means whereof the same dog did then and there grievously bite the right leg of him the said C. D., whereby the said leg of him the said C. D. was grievously hurt and wounded, and his life greatly endangered, and other wrongs to the said C. D. then and there did, to the great damage of the said C. D., against, &c.

FORM XXIX.

Assault and Tearing Prosecutor's Hair.

That A. B., of , in the county aforesaid, laborer, on, &c., at, &c., in and upon the body of one C. D. did make an assault, and her the said C. D. did then and there beat, wound, and abuse; and that he the said A. B. did then and there unlawfully, violently, and cruelly seize and lay hold of the said C. D. by the hair of her head, and did then and there with great force, wrath, and violence, pull and drag the said C. D. by the same, by means whereof the said A. B. did then and there unlawfully, cruelly, and brutally pull

and tear the hair of the head of her the said C. D. off by the roots, and the head of her the said C. D. was thereby grievously wounded and hurt, and the said C. D. thereby put in great pain and torture, and other wrongs the said A. B. then and there did and committed, to the great damage of her the said C. D., against, &c.

FORM XXX.

Assault with Intent to Kill and Murder.

That A. B., &c., on, &c., at, &c., with a certain drawn sword, which he the said A. B. in his right hand then and there had and held, in and one J. W. did make and assault with an intent him the said J. W. then and there feloniously, wilfully, and of his malice aforethought to kill and murder, and other wrongs to the said J. W. then and there did, against, &c. (*Add a count for a common assault.*)

FORM XXXI.

Assault with Intent to commit a Felony, generally.

That A. B., &c., at, &c., on, &c., in and upon one J. N., in the peace of God and said state, then and there being, unlawfully did make an assault (*and him the said J. N. then and there did beat, wound, and ill-treat*) with intent him the said J. N. to (*here state the felony intended as in form, supra*) and other wrongs to the said J. N. then and there did, to the great damage of the said J. N., against, &c. (*Add a count for an assault, as in Form XXV.*)

FORM XXXII.

FORGERY.

General Form of Indictment at Common Law.

That J. W., &c., on, &c., falsely and fraudulently did forge and counterfeit) and cause and procure to be forged and counterfeited), a certain promissory note for the payment of money, purporting to be made by one A. B. pay on demand to one C. D., the tenor of which said forged and counterfeited note is as follows, that is to say (*here insert the instrument*), with intent to defraud the said A. B. (to the great damage of the said A. B.), against, &c.

FORM XXXIII.

BURGLARY.

General Form of Indictment for Burglary and Larceny, at Common Law.

That A. B., &c., of, &c., laborer, on, &c., about the hour of one in the night of the same day, with force and arms, at, &c., then dwelling-house of one J. D. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said J. D. in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, and carry away; and one gold watch of the value of thirty dollars, of the goods and chattels of the said J. D., in the said dwelling-house then and there being found, then and there feloniously and burglariously did steal, take, and carry away, against, &c.

FORM XXXIV.

Burglary at Common Law without Larceny.

That A. B., late, &c., on, &c., about the hour of eleven in the night of the same day, at, &c., the dwelling-house of one J. D. there situate, feloniously and burglariously did break and enter with intent the goods and chattels, moneys, and property of the said J. D. in said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, and carry away, contrary, &c., and against, &c.

FORM XXXV.

Burglary by Breaking out of a House.

That C. D., late, &c., on, &c., about the hour of eleven in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, being in the dwelling-house of E. F. there situate, one watch, of the value of one hundred dollars, six tablespoons of the value of four dollars each, and twelve teaspoons of the value of two dollars each, of the goods and chattels of one J. W., in the same dwelling-house then and there being found, then and there feloniously did steal, take, and carry away. And that the said C. D., being so as aforesaid in said dwelling-house, and having so committed the felony aforesaid, in manner and form aforesaid,

therein afterwards, to wit, about the hour of twelve o'clock of the same day, with force and arms at B. aforesaid, in the county aforesaid, feloniously and burglariously did break out of the same dwelling-house. And the same goods and chattels then and there feloniously and burglariously did steal, take, and carry away, contrary, &c., and against, &c.

FORM XXXVI.

Attempt at Burglary at Common Law.

That J. B., late of, &c., on, &c., at, &c., the dwelling-house of W. H., there situate, about the hour of twelve in the night-time of the said day, unlawfully and wickedly did attempt and endeavor to break and enter, with an intent the goods and chattels of the said W. H., in the same dwelling-house then and there being, feloniously and burglariously to steal, take, and carry away, to the evil example of all others in the like case offending, and against, &c.

FORM XXXVII.

ARSON.

General Form of Indictment at Common Law.

That A. B., late, &c., a certain house of one C. D., there situate, feloniously, wilfully, and maliciously did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, wilfully, and maliciously did burn, against, &c.

FORM XXXVIII.

For Burning one's own House, with Intent to Defraud the Insurers.

That A. B., &c., on, &c., at, &c., feloniously, wilfully and maliciously, and unlawfully did set fire to a certain house, being in the possession of him the said A. B., with intent thereby to injure and defraud (*here state the corporation defrauded*), (then and there being a body corporate), against, &c., and against, &c.

FORM XXXIX.

ROBBERY.

General Form of Indictment at Common Law.

That A. B., &c., in the highway there, in and upon one E. F. there being, feloniously did make an assault, and him, the said E. F., in bodily fear and danger of his life, in the highway aforesaid, then and there feloniously, and one gold watch of the value of (*insert goods taken as in larceny*), goods and chattels of the said E. F., from the person and against the will of the said E. F., in the highway aforesaid, then and there feloniously and violently did seize, take, and carry away (with intent, from the person of the said E. F., the said goods and chattels of the said E. F. to rob and steal), against, &c.

FORM XL.

Attempting to Extort Money by Threatening to Accuse Another of a Crime.

That C. D., late of, &c., on, &c., with force and arms, at, &c., unlawfully and maliciously did threaten one J. N., in a certain conversation which the said C. D. then and there had, of and concerning the said J. N., to accuse the said J. N. of having (*here describe the accusation*), with the intent by so doing thereby then and there to extort from the said J. N. a certain sum of money, to wit, the sum of five hundred dollars, against, &c., and contrary, &c.

FORM XLI.

LARCENY.

General Form of Indictment at Common Law.

That A. B., at, &c., on, &c., one hat of the value of one dollar, of the goods and chattels of one C. D., then and there being found, feloniously did steal, take, and carry away, against, &c., and contrary, &c.

FORM XLII.

Stealing Bank Note.

That A. B., on, &c., at, &c., one promissory note for the payment of money, commonly called a bank note, issued by the President and Directors of the Bank of , for the payment of five dollars, being still due and unpaid, of the value of five dollars, of the goods and chattels, moneys and property of A. B., then and there being found, then and there feloniously did steal, take, and carry away, contrary, &c., and against, &c.

FORM XLIII.

RECEIVING STOLEN GOODS.

General Form of Indictment.

That A. B., in the county aforesaid, one silver watch of the value of thirty dollars, of the goods and chattels of one J. M., before then feloniously stolen, taken, and carried away (feloniously), [*to be omitted in cases of misdemeanor*], did receive and have (he, the said A. B., then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away), against, &c.

FORM XLIV.

EMBEZZLEMENT.

That A. B., &c., on, &c., at, &c., was employed in the capacity of a clerk and servant to one C. D., and as such clerk and servant was intrusted to receive, &c. (*stating the nature of the trust*), and being so employed and intrusted as aforesaid, the said A. B., by virtue of such employment, then and there did receive and take into his possession (*stating the subject of embezzlement*), for and on account of, &c., his said master and employer; and that the said A. B., on the day and year last aforesaid, with force and arms, at, &c., the county aforesaid, fraudulently and feloniously did take, make way with and secrete, and did embezzle and convert to his own use, without the assent of the said C. D., his master and employer, the said, &c., of the goods, chattels, personal property,

and money of the said C. D., which said goods, chattels, personal property, and money had come into his possession, and under his care, by virtue of his being such clerk and servant as aforesaid, to the great damage of the said C. D., &c.

Second Count. Larceny.

That the said A. B., on, &c., at, &c., of the goods, chattels, personal property of one C. D., then and there being found, feloniously did steal, take, and carry away, to the great damage of the said C. D., against, &c., and contrary to the statute, &c.

FORM XLV.

MALICIOUS MISCHIEF.

Indictment for Maliciously Wounding a Cow.

That A. B., &c., on, &c., one cow of the price of seven pounds, of the goods and chattels of C. D., then and there being, unlawfully, wilfully, and maliciously did wound, to the great damage of the said C. D., against, &c.

FORM XLVI.

Cutting Down Trees, &c.

That A. B., on, &c., at, &c., wilfully and maliciously did cut down and destroy ten ash-trees, planted in a certain avenue to the dwelling-house of one M. N., and then growing for ornament there (he the said M. N. then and there being owner of the said trees) to the great damage of the said M. N., against, &c.

FORM XLVII.

Killing a Steer, at Common Law.

That A. B., at, &c., on, &c., one steer of the value of five dollars, of the goods and chattels of one C. D., then and there being, then and there unlawfully, wantonly, maliciously, and mischievously did kill, to the great damage of the said C. D., against, &c.

FORM XLVIII.

CHEATS, AT COMMON LAW.

Indictment against Selling by False Weights and Measures.

That A. B., at, &c., on, &c., and from thence until (*the taking of this inquisition*), did use and exercise the trade and business of a grocer, and during that time did deal in the buying and selling by weight, of (tea, &c.), and of divers other goods, wares, and merchandise, to wit, at, &c., aforesaid; and that the said A. B., contriving and fraudulently intending to cheat and defraud the people of the said state, while he used and exercised his said trade and business, to wit, &c., and on divers other days and times between that day and the day of (*taking this inquisition*), at, &c., did knowingly, wilfully, falsely, fraudulently, and deceitfully keep in a certain shop there, wherein he the said A. B. did so as aforesaid carry on his said trade, a certain false pair of scales for the weighing of goods, wares, and merchandise by him sold in the way of his said trade, which said scales were then and there, by artful and deceitful contrivance, so made and constructed as to cause every quantity of goods, wares, and merchandise weighed therein and sold thereby to appear of greater weight than the real and true weight, by one-tenth part of such apparent weight, and that the said A. B., on, &c., aforesaid, at, &c., aforesaid (he the said A. B. then and there well-knowing said scales to be false as aforesaid), did knowingly, wilfully and fraudulently sell and utter to one C. D., a citizen of said state, certain goods, wares, and merchandise in the way of his trade, to wit, a large quantity of tea, weighing in and by said false scales, and as and for ten pounds weight of tea, whereas, in truth and in fact, the weight of the said tea so sold as aforesaid, was short and deficient of the said weight of ten pounds by one-tenth part of the said weight of ten pounds, to wit, at, &c., aforesaid, against, &c.

FORM XLIX.

OBTAINING GOODS BY FALSE PRETENSES.

General Frame of Indictment.

That A. B., on, &c., at, &c., devising and intending to cheat and defraud, &c. (*stating party intended to be defrauded*), of his goods,

moneys, chattels, and property, unlawfully, knowingly, and designedly, did then and there falsely pretend to C. D., that (*setting out the pretense*), whereas, in truth and in fact (*negativing the pretense*), as he the said A. B. then and there well knew (*or*, which said pretense the said A. B. then and there well knew to be false) by color and means of which said false pretense and pretences, he, the said A. B., did then and there unlawfully, knowingly, and designedly obtain from the said C. D. (*stating the property obtained*), being then and there the property of the said C. D., with intent to cheat and defraud the said C. D., to the great damage of the said C. D., against, &c.

FORM L.

Obtaining Money by Personating Another.

That A. B., on, &c., at, &c., unlawfully, knowingly, and designedly did falsely pretend to E., the wife of C. D., that the said A. B. was F. G., and that he was the same person that cured H. J., by means of which false pretenses the said A. B. did then and there unlawfully, knowingly, and designedly obtain from the said E. the sum of five dollars, of the money of the said C. D., with intent then and there to cheat and defraud the said C. D. of the same; whereas, in truth and in fact, the said A. B. was not F. G.; and whereas, in truth and in fact, the said A. B. was not the same person that had cured H. J., as the said A. B. then and there well knew, against, &c.

FORM LI.

Same, by Check on a Bank where the Defendant had no Effects.

That A. B., on, &c., at, &c., unlawfully, knowingly, and designedly did falsely pretend to C. D. that a certain paper writing produced by the said A. B. to the said C. D., and purporting to be a check drawn by the said A. B. upon E. F. & Co., bankers, for the payment to the bearer of the sum of one hundred dollars, was then and there a good, genuine, and available order for payment of the sum of one hundred dollars, and was then and there of the value of one hundred dollars, which said check is of the tenor following, that is to say, &c.; and that the said A. B. kept an account with

the said E. F. & Co., and that the said A. B. had money in the hands of the said E. F. & Co. for the payment of the said check, and that the said A. B. had full power, right, and authority to draw checks on the said E. F. & Co., by means of which said false pretenses the said A. B. did then and there unlawfully, knowingly, and designedly obtain from the said C. D. a gold watch of the value of seventy-five dollars, and a gold chain of the value of twenty-five dollars, of the goods and chattels of the said C. D., with intent then and there to cheat and defraud the said C. D. of the same; Whereas, in truth and in fact, the said paper writing was not then and there a good, genuine, and available order for payment of the sum of one hundred dollars, nor was the same then and there of the value of one hundred dollars; and whereas, in truth and in fact, the said A. B. did not keep any account with the said E. F. & Co.; and whereas, in truth and in fact, the said A. B. had not any money in the hands of the said E. F. & Co. for the payment of the said check; and whereas, in truth and in fact, the said A. B. had not any power, right, or authority to draw checks upon the said E. F. & Co., as the said A. B. then and there well knew, against, &c.

FORM LII.

Same, by Pretense that Defendant was the Agent of A. B., and as such had been sent by A. B. to C. D. to receive certain money due from the latter to the former.

That E. F., on, &c., at, &c., being a person of an evil disposition, and devising and intending by unlawful ways and means to obtain and get into his hands and possession, the goods, merchandise, chattels, and effects of the honest and good citizens of this state, and with intent to cheat and defraud one A. W. and one G. S. of their money, did then and there unlawfully, knowingly and designedly falsely pretend and represent to one C. A. P., a person who owed a sum to said W. and S., to wit, the sum of ten dollars, that the said E. F. then and there was an authorized collector and a servant of said W. and S., and that said W. and S. had employed and sent him to collect and receive for them said sum of money due as aforesaid, and owed by the said C. A. P. to them. And the said C. A. P. then and there believing the said false pretenses and representations so made as aforesaid by the said E. F., and being

deceived thereby, was induced by reason of the false pretenses and representations so made as aforesaid, to deliver, and did then and there deliver, to the said E. F. the sum of ten dollars, due and owing from him the said C. A. P. to said W. and S. of the proper money and effects of said C. A. P. due and owing as aforesaid to said W. and S., and the said E. F. did then and there receive and obtain the said money and effects of the said C. A. P., due and owing as aforesaid to said W. and S., by means of the false pretenses and representations so made as aforesaid, and with the intent to cheat and defraud the said C. A. P. and said W. and S. of the same money and effects; whereas, in truth and in fact, said E. F. then and there was not an authorized collector and a servant of said W. and S., and the said W. and S. had not then and there employed and sent, and did not then and there employ and send, said E. F. to collect and receive for them said sum of money so due and owing as aforesaid from said C. A. P. to them, but had forbidden said E. F. to collect and receive any money for them, and had long before turned him out of their employment; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said E. F., by means of the false pretenses aforesaid, on, &c., at, &c., unlawfully, knowingly, and designedly did receive and obtain from said C. A. P. said sum of ten dollars, being the said money due and owing aforesaid, and effects of the proper money and effects of the said C. A. P., due, owing, and payable to said W. and S., with intent to defraud them of the same, against, &c.

FORM LIII.

Pretense made to a Tradesman that Defendant was a Servant of a Customer, and was sent for the particular goods obtained.

That A. B., on, &c., at, &c., contriving and intending, unlawfully, fraudulently, and deceitfully to cheat and defraud one C. D. of his goods, wares, and merchandise, on, &c., at, &c., aforesaid, unlawfully, knowingly, and designedly did falsely pretend to the said C. D. that he, the said A. B., then was the servant of one E. F. of, &c., tailor (the said E. F. then, and long before, being well known to the said C. D., and a customer of the said C. D. in his said business and way of trade), and that he the said A. B. was sent by the said E. F. to the said C. D. for ten yards of certain superfine

woolen cloth, by which said false pretense the said A. B. did then and there, to wit, on, &c., at, &c., aforesaid, unlawfully, knowingly, and designedly obtain from the said C. D. ten yards of superfine woolen cloth, of the value of fifteen dollars, of the goods, wares, and merchandise of the said C. D. with intent then and there to cheat and defraud him the said C. D. of the same, whereas, in truth and in fact, the said A. B. was not then the servant of the said E. F., and whereas he, the said A. B., was not then or ever hath been, sent by the said E. F. to the said C. D. for said cloth, or for any cloth whatsoever, against, &c.

FORM LIV.

PERJURY.

General Form of Indictment. Perjury in Swearing an Alibi for a Felon.

That at the court, &c. (*setting forth the style of the court*) before (*stating the members of the court*) one H. B. was in due form of law tried upon a certain indictment then and there depending against him, and of which said court had jurisdiction, for having on, &c., feloniously stolen, taken, and carried away ten dollars of the moneys of one J. A., and that at the said trial, so then and there had as aforesaid, J. S., late of, &c., laborer, appeared as a witness for and on behalf of the said H. B. upon the said trial, and was sworn, and took his corporal oath before the said J. M., judge as aforesaid, on the holy gospel of God, to speak the truth, the whole truth, and nothing but the truth, of, upon, and concerning the matter then depending (he the said J. M., judge as aforesaid, then and there having sufficient and competent power to administer an oath to the said H. B. in that behalf, whereupon it then and there became a material inquiry on the trial of the said issue, whether (*here state the several questions*); and the said J. S. being so sworn as aforesaid, wickedly contriving and intending to cause the said H. B. unjustly to be acquitted of the said felony, did then and there, knowingly, falsely, corruptly, wilfully, and wickedly, say, depose, and give in evidence to the jurors of the jury then and there duly taken and sworn between the said state and the said H. B. before the said J. M., judge as aforesaid, that he the said J. S. on the second day of K. races (meaning the twenty-sixth of July, &c., being the second of three successive days on which

certain horse-races were run at K., in the said county of C., in that year), was in a certain booth at K. aforesaid, known by the sign of the Bull's Head, kept by one R. G., and that he the said J. E. came into the said booth and sat down by him (meaning himself the said J. S.) on the left hand side; and that he (meaning himself the said J. S.) asked the said J. E. if he (meaning the said J. E.) was not ill, and that he (meaning the said J. E.) said I (meaning the said J. E.) am well enough. I (meaning himself the said J. E.) have been playing at cards with a parcel of men, and have lost a great deal of money; and he, the said J. S., said, man (meaning the said J. E.), I (meaning himself the said J. S.) am very sorry for you (meaning the said J. E.); and that the said J. S. upon his oath aforesaid, before the said jury so taken between the said state and the said H. B. and the said J. M., judge as aforesaid, did further say, depose, swear, and give in evidence, that the said J. E. took him the said J. S. by the hand, and said, I (meaning himself the said J. E.) will never play at cards any more; whereas, in truth and in fact, the said J. E. did not sit down by the said J. S. in the said booth on the 26th day of July aforesaid, and whereas, in truth and in fact, the said J. S. did not ask the said J. E. whether he was well or not, and whereas, in truth and in fact, the said J. E. did not say to the said J. S. that he was well enough, and whereas, in truth and in fact, the said J. E. did not say to the said J. S. that he the said J. E. had been playing at cards with a parcel of men, and had lost a great deal of money, and whereas, in truth and in fact, the said J. S. did not say to the said J. E. that he (meaning himself the said J. S.) was sorry for him (meaning the said J. E.), and whereas, in truth and in fact, the said J. E. did not say to the said J. S. that he would never play at cards any more, and whereas, in truth and in fact, the said J. E. had not on said day of any conversation whatsoever with the said J. S.; all which statements made by the said J. S. the said J. S. then and there well knew to be false, and so the jurors aforesaid now here sworn, upon their oaths aforesaid, do say, that the said J. S. at the said court of, &c., before the said J. M., then being judge as aforesaid (and then and there having sufficient and competent power and authority to administer the said oath to the said J. S.), did in manner and form aforesaid, commit wilful and corrupt perjury, against, &c.

FORM LV.

CONSPIRACY.

General Form of Indictment. First Count. Unexecuted Conspiracy.

That A. B., late of, &c., yeoman, and C. D., late of, &c., yeoman, being persons of evil minds and dispositions, together with divers other evil disposed persons, whose names are to the jury unknown, wickedly devising and intending to (*setting out the intent*) on, &c., at, &c., aforesaid, and within the jurisdiction of the said court, fraudulently, maliciously, and unlawfully did conspire, combine, confederate, and agree together, between and amongst themselves, by (*setting forth the means*) unlawfully to (*setting forth the party to be injured, or the object to be attained*), against, &c.

Same. Second Count. Overt Act.

That the said defendants, being such persons as aforesaid, and devising and intending as aforesaid, afterwards, to wit, on, &c., at, &c., fraudulently, maliciously, and unlawfully did conspire, combine, confederate, and agree together, between and amongst themselves, &c. (*as in first count, and proceed to state overt act as follows:*) And the jurors, &c., on their oaths aforesaid, do further present, that the said defendants, together with the evil disposed persons, in execution of the last mentioned premises, and in pursuance of the said conspiracy, combination, and agreement, between and amongst them as aforesaid, afterwards, to wit, on, &c., at, &c., did (*setting forth overt act*), against, &c.

FORM LVI.

Conspiracy to Rob.

That, &c., being persons of evil minds and dispositions (with divers others, &c.), on, &c., at, &c., unlawfully and wickedly did conspire, combine, confederate, and agree together in and upon one A. B., in the peace of God and of said state then and there being, feloniously to make an assault, and him the said A. B. in bodily fear and danger of his life then and there feloniously to

put, and the goods and chattels, moneys and property of the said A. B., from the person and against the will of the said A. B. then and there feloniously and violently to steal, take, and carry away, to evil example of all others in like manner offending, against, &c.

FORM LVII.

Conspiracy to Murder, with an Attempt to Induce a Third Party to take part in the Same.

That H. D., &c., and J. S., &c., not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on, &c., at, &c., did intend, combine, conspire, and agree together a certain F. M., in the peace of God and of said state then and there being, feloniously and of their malice aforethought to kill and murder; and the jurors aforesaid, upon their oaths aforesaid, &c., that the said H. D. and J. S., in the prosecution of such their wicked and diabolical intention and agreement, at the day and year aforesaid, at, &c., aforesaid, and within the jurisdiction aforesaid, did labor and instigate, solicit, entice, and endeavor to persuade one certain T. O. to aid, assist, and abet them, the said H. and J., in accomplishing and fulfilling their said wicked intentions, and in the felony and murder by them intended to be committed. And the jurors aforesaid, upon their oaths aforesaid, do further present that the said H. D., on, &c., aforesaid, at, &c., aforesaid, and within the jurisdiction of this court, in the further prosecution of such his wicked intentions aforesaid, did offer and promise to give unto the said T. O. a new suit of wearing apparel and six hundred dollars, if he, the said T. O., would admit him, the said H. D., secretly and in the night-time, into the dwelling-house of the said F. M., that he, the said H. D., might then and there feloniously kill and murder the said F. M., to the evil example, &c., and against, &c.

FORM LVIII.

NUISANCE.

General Form of Indictment.

That A. B., late, &c., on, &c., at, &c., and on divers days and times between that day and the finding of this indictment, at, &c.,

near to the dwelling-houses of divers citizens of, &c., and also to divers public streets of said, &c., did, &c. (*stating the particular offense*), on, &c., and on other days and times aforesaid (knowingly and intentionally), by reason whereof (*state the particular annoyance*), to the great damage and common nuisance not only of all the inhabitants of the said, &c., but of all other good citizens of the said state, there (*or, if the nuisance be on a highway, say, on said highway*) returning, passing, repassing, riding, and laboring, against, &c.

FORM LIX.

Profane Swearing in a Street.

That A. B., being an evil-disposed person, &c., did in the public streets of, &c., profanely curse and swear and take the name of God in vain, to the evil example, &c., and to the common nuisance of the good citizens of the state, and against, &c.

FORM LX.

Gaming-Houses.

That A. B., on, &c., at, &c., and on divers other days and times as aforesaid, with force and arms, at, &c., aforesaid, a certain common gaming-house there situate for lucre and gain unlawfully and injuriously did keep and maintain, and in the said common gaming-house there unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to be and remain in the said common gaming-house, and to game together, and play at cards, dice, billiards (*adding other games, &c.*), for money, on, &c., aforesaid, and on the said other days and times there did unlawfully and injuriously procure, permit, and suffer; and the said persons, in the said common gaming-house, there on, &c., aforesaid, and on said other days and times, by such procurement, permission, and sufferance of the said A. B., did game together and play at cards, dice, and billiards (as above), for money, to the great damage and common nuisance of all the people of the state of Mississippi, and against, &c.

FORM LXI.

Disorderly House.

That A. B., on, &c., at, &c., and on divers other days and times, as well before as since, did keep and maintain a certain common house of ill-fame there situate, resorted to for the purpose of prostitution and lewdness; and in said house, for own lucre and gain, certain persons, whose names to said jurors as yet are not known, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together, then and on the said other days and times there unlawfully and wilfully did cause and procure, and the said men and women in said house at unlawful times, as well in the night as in the day, then and on said other days and times, there to be and remain whoring (*insert other acts of disorder, as the facts may be*), and otherwise misbehaved themselves, unlawfully and wilfully did permit and suffer, to the great injury and common nuisance, &c., and against, &c.

FORM LXII.

House of Ill-Fame.

That A. B., on, &c., at, &c., in the county aforesaid, and on divers other days and times between that day and the finding of this indictment, at, &c., aforesaid, did keep a certain house of ill-fame, then and there resorted to for the purpose of public prostitution and lewdness, against, &c.

FORM LXIII.

GAMING.

See *Nuisance.*

That A. B., on, &c., at, &c., did unlawfully play at a game with cards, commonly called poker, a game of hazard, for money; against, &c.

FORM LXIV.

Against Inn-Keeper for Permitting Gaming in His House.

That A. B., on, &c., at, &c., on divers days and times between that day and the finding of this indictment, unlawfully did permit

persons to come together to play at a game for money, at and in a tavern then and there kept by him, and licensed to him to keep then and there as such tavern, against, &c.

FORM LXV.

DOING BUSINESS ON SUNDAY.

That A. B., on, &c., that day being Sunday, commonly called the Sabbath or the Lord's day, and between the hour of twelve of the clock at night on the Saturday night preceding said Lord's day and the time of the sun's setting on said Lord's day, at, &c., did keep open his shop, there situate, for a long time, to wit, for the space of one hour, for the purpose of doing labor, business, and work therein, not being works of necessity or charity, namely, selling goods and merchandise therein on said Lord's day, as aforesaid, against, &c., and contrary, &c.

That A. B., of, &c., on, &c., that day being the Lord's day, commonly called Sunday, and between the midnight preceding and the midnight succeeding said day, at, &c., aforesaid, he then and there being a person keeping a certain house, shop, and place of public entertainment and refreshment, there situate, did then and there suffer certain persons, whose names to the jurors are unknown, to the number of , to abide and remain in his said house, shop, and place of business, drinking and spending their time idly, said persons not being travelers, strangers, or lodgers in his house and shop and place of business aforesaid, and did then and there, and between the midnight preceding and the midnight succeeding said Lord's day, entertain said persons to the said number of , in his said house, shop, and place of business, against, &c., and contrary, &c.

That A. B., of, &c., on, &c., between the midnight preceding and the sun-setting of said day, that day being the Lord's day, commonly called Sabbath, did, at, &c., aforesaid, do certain work, labor, and business, not being works of necessity and charity, to wit, did then and there work, labor, and do business, work and labor in , against, &c., and contrary, &c.

That A. B. of, &c., on, &c., at, &c., he then and there not being licensed as an inn-holder, tavern-keeper, common victualler, or retailer of wine, rum, brandy, or other spirituous liquor, did sell to a person whose name is as yet to said jurors unknown, a cer-

tain quantity of intoxicating liquor, to wit, one-half a gill of intoxicating liquor, the same day of , being Sunday, commonly called Sabbath, and the time of said sale of said intoxicating liquor being between the hour of twelve of the clock on the Saturday night preceding said Sunday and the time of the sun-setting on said Sunday, against, &c., and contrary, &c.

FORM LXVI.

LASCIVIOUS COHABITATION, AT COMMON LAW.

That A. B., &c., and C. D., &c., being scandalous and evil-disposed persons, on, &c., at, &c., devising and intending the morals of the citizens of said state to debauch and corrupt, on, &c., and on divers other days and nights between that day and the finding of this indictment, and for all the time aforesaid, in the county aforesaid, in presence and view of divers good citizens, and in the face of the county, unlawfully, wilfully, wickedly, scandalously did then and there live, cohabit, and use together as man and wife, in lewd acts of fornication and adultery, openly, notoriously, and publicly, they not being married, to the great scandal of the said good and worthy citizens of the said state, to the manifest corruption of their morals and the morals of the public, in contempt of the said state and the laws of the land, to the evil example, &c., and against, &c.

FORM LXVII.

NOTORIOUS DRUNKENNESS.

That A. B., on, &c., at, &c., and on divers other days before that time, was openly and notoriously drunk (on the highways of said county, and in public view of all citizens of said state then and there passing and repassing), to the disturbance of the public peace, to the great injury of the public morals of the good citizens of said state, and to the evil example, &c., to the common nuisance, &c., and against, &c.

FORM LXVIII.

AGAINST OVERSEER FOR NEGLECTING TO REPAIR A ROAD.

That A. B., late of, &c., in said county, on, &c., in the county aforesaid, did fail and neglect to keep that part of said road, the

bridges and causeways therein, within his precinct, clear and in good repair, and did then and there suffer the same to remain uncleared and out of repair for ten days at one time, to wit, between the day of , last aforesaid, and the day of , in the year of our Lord, &c., without being hindered by high-water, bad weather, or other sufficient cause, contrary, &c., and against, &c.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said A. B., late of, &c., overseer as aforesaid, of the road aforesaid, on the day and year last aforesaid, in the county aforesaid, did fail and neglect to set up neat and permanent mile-posts at the end of each mile, in continuation on that part of his said road within his precinct, contrary, &c., and against, &c.

FORM LXIX.

VIOLATIONS OF LICENSE LAWS.

That A. B., &c., on, &c., at, &c., did then and there unlawfully sell and retail vinous and spirituous liquors, to wit, wine, rum, gin, brandy, ale, and porter, in a less quantity than one gallon, to one C. D. and to other persons to the jurors aforesaid unknown, contrary, &c., and against, &c.

That on, &c., A. B., being then and there a tavern-keeper and inn-keeper, with force, and at, &c., aforesaid, did then and there unlawfully, gratuitously, and without special charge therefor, offer, give, and deliver vinous and spirituous liquors, to wit, wine, rum, gin, brandy, whisky, ale and porter, in a less quantity than one gallon, to one C. D. and to other persons to the jurors aforesaid unknown; which said C. D., and which said other persons, were then and there the guests of the said A. B., contrary, &c., and against, &c.

FORM LXX.

DISINTERRING DEAD BODIES.

That A. B., &c., on, &c., with force and arms, &c., at, &c., the churchyard of and belonging to the church of , &c., there situate, unlawfully did enter, and the grave there in which the body of one C. D., deceased, had lately before then been

interred, and then was, with force and arms, unlawfully, voluntarily, wilfully, and indecently did dig, open, and afterwards, to wit, on the same day and year aforesaid, with force and arms, at, &c., aforesaid, the body of him, the said C. D., out of the grave aforesaid, unlawfully and indecently did take and carry away, against, &c.

FORM LXXI.

SELLING LOTTERY TICKETS.

That A. B., on, &c., at, &c., unlawfully did vend and sell to one C. D. a certain lottery ticket, purporting to be in the lottery, numbered , called class number series, with certain combination numbers thereon, to wit, combination numbers , which said ticket purported to entitle the holder thereof to one-half of such prize as might be drawn to its number, if demanded within after the drawing, subject to a deduction of fifteen per cent., payable after the drawing, which said lottery on the face of the said ticket purported that the drawing would take place at, &c., and was dated , in contempt of the people, &c., and contrary, &c., and against, &c.

FORM LXXII.

Same.

That A. B., &c., on, &c., at, &c., unlawfully, &c., did sell to one C. D. a certain lottery ticket (*where only lotteries of a certain class are prohibited, particularize the class*), contrary, &c., and against, &c.

RIOT, AFFRAY, &c.

FORM LXXIII.

General Form of Indictment for Riot.

That A. B., &c., C. D., &c., E. F., &c., with divers evil-disposed persons, to the number of ten or more, to the jurors aforesaid as yet unknown, on, &c., with force and arms, at, &c., did unlawfully, riotously, routously, and tumultuously assemble and meet together to disturb the peace of said state, and being so then and there

assembled and gathered together, did then and there make great noise, riot, tumult, and disturbance, and then and there unlawfully, riotously, routously, and tumultuously remained and continued together, making much noises, tumults, and disturbances for a space of time, to wit, &c., to the great terror and disturbance not only of the good citizens of said state there inhabiting residing, but of all the other citizens of the said commonwealth there passing and repassing in and along the public streets and common highways there, in contempt, &c., and contrary, &c., and against, &c.

FORM LXXIV.

Affray, at Common Law.

That A. B., &c., and J. W., &c., on, &c., with force and arms, at, &c., being unlawfully assembled together and arrayed in a warlike manner, then and there in a certain public street and highway there situate, unlawfully, and to the great terror and disturbance of divers citizens of the said state then and there being, did make an affray, by then and there fighting with each other in the public street and highway aforesaid, to the evil example, &c., and against, &c.

FORM LXXV.

Unlawful Assembly, and Assault.

That A. B. (*and the others*), together with divers other evil-disposed persons, to the number of three and more, to the jurors aforesaid yet unknown, on, &c., with force and arms, &c., at, &c., did unlawfully, riotously, and routously assemble and gather together to disturb the peace of the said state, and so being then and there assembled and gathered together, in and upon J. W., in the peace of God and said state then and there being, unlawfully, riotously, and routously did make an assault, and him the said J. W. then and there unlawfully, riotously, and routously did beat, wound, and ill-treat, so that his life was greatly despaired of, and other wrongs to the said J. W. then and there unlawfully, riotously, and routously did, to the great damage of the said J. W., and against, &c.

FORM LXXVI.

Disturbing Religious Worship.

That A. B., &c., on, &c., being Sunday, with force and arms, at, &c., in the Damascus Baptist Church there situate, during the celebration of divine service, unlawfully, unjustly, and irreverently did disturb and hinder one J. B., then and there being minister officiating in the said church, and then being in the discharge of his sacred functions, and in the performance of divine service, to the evil example, &c., and against, &c.

FORM LXXVII.

Disturbance of Election.

That heretofore, to wit, on, &c., at B., in the county of S., a town meeting of the inhabitants of said B., for the election of governor and lieutenant-governor of said state, and for senators for the district of S., was then and there duly holden. And the jurors aforesaid, upon their oaths aforesaid, do further present, that C. D., late of B., in the county of S., laborer, afterwards, to wit, on the day and year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in the town-meeting aforesaid, did behave himself disorderly, by then and there (*here set out the facts according to the evidence*), contrary, &c., and against, &c.

FORM LXXVIII.

Resisting an Officer.

That A. B., &c., on, &c., at, &c., with force and arms, in and upon one J. E., then and there in the peace of said state being, an assault did make, he the said J. E. also then and there being a peace officer, called a sheriff, and then and there being in the due and lawful discharge of his duties as such officer. And so the jurors aforesaid, upon their oath aforesaid, do present that the said A. B., at, &c., aforesaid, on, &c., aforesaid, with force and arms assaulted the said J. E., as such officer, and hindered, resisted and obstructed him in the discharge of his lawful duties, in manner and form aforesaid, against, &c.

COMPOUNDING FELONY AND MISDEMEANOR.

FORM LXXIX.

Form against Compounding Felony, at Common Law.

That A. B., &c., on, &c., with force and arms, at, &c., one silver spoon of the value of one dollar, of the goods and chattels of one C. D., then and there being found, feloniously did steal, take, and carry away, against, &c.

And, &c., that the said C. D., late of, &c., well knowing the premises, but unlawfully and unjustly contriving and intending to prevent the due course of law in this behalf, and to procure the said A. B. to escape with impunity, afterwards, to wit, on, &c., at, &c., unlawfully and unjustly and for the sake of wicked lucre, did compound the said felony with the said A. B., and did then and there exact, receive, and have of the said A. B. five pounds in money, numbering for and as a reward for compounding for the said felony, and for desisting from all prosecution of the said A. B. for the felony aforesaid, and that the said C. D., on, &c., at, &c., did thereupon desist, and from that time hitherto hath desisted from all prosecution of the said A. B. for the felony aforesaid, to the great hinderance of public justice, and against, &c.

FORM LXXX.

LIBEL.

General Form of Indictment.

That A. B., &c., on, &c., unlawfully and maliciously contriving and intending to vilify and defame one C. D., and to bring him into public scandal and disgrace, and to injure and aggrieve him the said C. D., on, &c., at, &c., unlawfully and maliciously did compose and publish, and cause and procure to be composed and published, a certain false, scandalous, malicious, and defamatory libel of and concerning him, the said C. D., containing therein, among other things, the false, malicious, defamatory, and libellous words and matters following, that is to say (*here give the libellous matter in the manner exactly as stated in the publication and proceed*), to the great injury, scandal, and disgrace of the said C. D., and against, &c.

FORM LXXXI.

Libel on an Individual generally.

That C. D., &c., being a person of an envious, evil, and wicked mind, and of a most malicious disposition, and wickedly, maliciously, and unlawfully minding, contriving and intending as much as in him lay, to injure, oppress, aggrieve, and vilify the good name, fame, credit, and reputation of A. B., a good, peaceable, and worthy subject of our said lord the king, and to bring him into public scandal, hatred, infamy, and disgrace (or, into public scandal, contempt, ridicule and disgrace, &c., *according to the nature of the libel*), with force and arms, on, &c., at, &c., of his great hatred, malice, and ill-will towards the said A. B., wickedly, maliciously, and unlawfully did compose and write, and cause and procure to be composed and written, a certain false, scandalous, malicious, and defamatory libel, of and concerning the said A. B., containing the false, scandalous, malicious, and defamatory words and matter following, of and concerning the said A. B., that is to say (*set out a copy with proper innuendoes to explain the meaning, if they be necessary*), which said scandalous, malicious, and defamatory libel he the said C. D. afterwards, to wit, on, &c., at, &c., wickedly, maliciously, and unlawfully did send, and cause to be sent to one E. F. in the form of a letter, directed to the said E. F., and did thereby then and there, unlawfully, wickedly, and maliciously publish, and cause to be published, the said libel, to the great damage, disgrace, scandal, and infamy of the said A. B., and against, &c.

Same. Second Count.

That the said C. D. being such envious, evil, wicked, and malicious person, and wickedly, maliciously, and unlawfully minding, contriving, and intending as aforesaid, afterwards, to wit, on the same day and year aforesaid, with force and arms, at, &c., of his great hatred, malice, and ill-will towards the said A. B., wickedly, maliciously, and unlawfully did write (*or* print) and publish, and cause and procure to be written (*or* printed) and published, a certain other false, scandalous, malicious, and defamatory libel, of

and concerning the said A. B., containing the false, scandalous, malicious, and defamatory words and matter following, of and concerning the said A. B., that is to say (*set out the libel and conclude as before*).

Same. Third Count. For Publishing generally. For Posting a Man as a Scoundrel.

That A. B., &c., being a person of an envious and wicked mind, and of a malicious disposition, and unlawfully contriving and contending, as much as in him lay, to injure, oppress, aggrieve, and vilify the good name, credit, and reputation of one C. H., &c., and to bring him into great contempt, hatred, infamy, and disgrace, on, &c., with force and arms, at, &c., a certain false, scandalous, and libellous writing against the said C. H. falsely, maliciously, and scandalously did frame and make, and then and there cause to be written, published, and posted up [the purport, substance, and effect of][1] which said writing is as follows, to wit, "C. H. (meaning the aforesaid C. H.) is a *liar*, a *scoundrel*, a *cheat*, and a *swindler*. Don't pull this down. Nov. 7, 1807;" and that the said W. C., with intention to scandalize the C. H., and to bring him into contempt, infamy, and disgrace, the aforesaid false, scandalous, malicious, and libellous writing so as aforesaid written, framed and made, afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, and in one of the public streets of said town, falsely, maliciously, and scandalously did publish and post up, to the great scandal, infamy, and damage of the said C. H. to the evil example, &c., and contrary, &c.

FORM LXXXII.

BIGAMY.

General Form.

That A. B., late of, &c., laborer, on, &c., did marry one C. D., spinster, and her the said C. D. then and there had for wife, and that the said A. B. afterwards, and whilst he was so married to the said C. D. as aforesaid, to wit, on, &c., at, &c., feloniously and unlawfully did marry and take to wife one E. F., and to her, the

[1] The words in brackets can be omitted.

said E. F., was then and there married, the said C. D., his former, then being alive, contrary, &c., and against, &c.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said A. B. afterwards, to wit, on, &c., at, &c., was apprehended (*or*, that the said A. B. now is in custody at, &c.) for the felony aforesaid.

FORM LXXXIII.

ADULTERY.

Against both Parties jointly.

That C. E., &c., and E. R. F., the wife of J. N., late, &c., at, &c., did commit the crime of adultery with each other, by him the said C. E. having then and there carnal knowledge of the body of the said E. R. F. and by her the said E. R. F. having carnal knowledge of the body of the said C. E., she the said E. R. F. being then and there a married woman, and having a lawful husband alive, and not being then and there the wife of the said C. E. (and the said C. E. being then and there a married man, and then and there having a lawful wife alive other than the said J. S.), and the said C. E. and the said E. R. F. not being then and there lawfully married together; against, &c., and contrary, &c.

FORM LXXXIV.

Adultery by a Married Man with a Married Woman.

That A. B., &c., laborer, on, &c., at, &c., did commit the crime of adultery with one C. D., the lawful wife of one E. F., by then and there having carnal knowledge of the body of her the said C. D., he the said A. B. being then and there a married man, and having a lawful wife alive, and he the said A. B. not being married to the said C. D.; and she the said C. D. being then and there a married woman, and the lawful wife of the said E. F., contrary, &c., and against, &c.

FORM LXXXV.

Adultery against the Man.

That A. B., &c., laborer, on, &c., at, &c., and within the jurisdiction of this court, then and there being a married man, and having

a lawful wife then living, did commit adultery with a certain C. S. (she, the said C. S., not being the wife of the said A. B.), and a bastard child on the body of her the said C. S. then and there did beget, against, &c.

FORM LXXXVI.

Same against Woman.

That C. D., wife of J. S., on, &c., at, &c., then and there being a married woman, and having a husband then living, adultery with a certain A. B., of, &c., laborer, did commit, contrary, &c.

FORM LXXXVII.

Against an Uncle and Niece for an Incestuous Marriage.

That W. T., &c., on, &c., with force and arms, at, &c., and within the jurisdiction of this court, unlawfully, wilfully, and incestuously did intermarry with, and take to be his wife, a certain E. H., the niece of the said W. T., being the daughter of one S. H., the sister of the said W. T., and within the degrees prohibited by an act of the legislature of Mississippi, entitled, &c., and that the said W. T. and the said E. H. then and there from, &c., until the finding of this indictment, did unlawfully, willingly and incestuously continue to cohabit and live together as man and wife, contrary, &c., and against, &c.

FORM LXXXVIII.

Fornication and Bastardy.

That A. B., late, &c., on, &c., at, &c., and within the jurisdiction of this court, did commit fornication with a certain C. E., and a male bastard child on the body of her the said C. E. then and there did beget, contrary, &c., and against, &c.

FORM LXXXIX.[1]

Living in a State of Adultery and Fornication.

That J. S. and E. F., both late of, &c., on, &c., at, &c., aforesaid, did then and there unlawfully live together in an open state of

[1] Bassett, 158.

adultery and fornication. The said J. S. being then and there a single and unmarried man, and the said E. F. being then and there a married woman, contrary, &c., and against, &c.

FORM XC.

MAINTENANCE.

That A. B., late, &c., on, &c., with force and arms, at, &c., did unjustly and unlawfully maintain and uphold a certain suit which was then depending in the court of the said people of the state, before their judges, between J. P., plaintiff, and R. D., defendant, in a plea of debt, on behalf of the said J. P. against the said R. D., contrary to the statute in such cases made and provided, and to the manifest hinderance and disturbance of justice, and in contempt of the said people of said state, and to the great damage of the said R. D., and against, &c.

FORM XCI.

BRIBERY.

Endeavoring to Bribe a Constable.

That on, &c., one A. B., Esq., then and yet being one of the justices of the peace in and for the county of W., duly qualified, appointed, and sworn to discharge and perform the duties of said office, did then and there make and issue a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to any of the constables of the town of B., in the county aforesaid, thereby commanding them upon sight thereof to take and bring before him, the said A. B., so being such justice as aforesaid (*or some other justice of the peace of said county, if such be the warrant*), the body of one C. D., of, &c., to answer (*as in the warrant*); and which said warrant, afterwards, to wit, on, &c., at, &c., was delivered to E. F., of, &c., he the said E. F. then being one of the constables of the said town of B. aforesaid, duly appointed and qualified to discharge the duties of said office of constable, to be executed in due form of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H., late of, &c., well knowing the premises, but contriving and unlaw-

fully intending to prevent the due course of law and justice, and to prevent the said C. D. from being arrested and taken under and by virtue of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, at, &c., unlawfully, wickedly, and corruptly did offer (*or* promise) unto the said E. F., so being constable as aforesaid, and having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of ten dollars, if he the said E. F. would refrain from executing the said warrant, and from taking and arresting the said C. D. under or by virtue of the same warrant, for and during fourteen days from that time, that is to say, from the time he the said G. H. so offered the said sum of ten dollars to the said E. F. as aforesaid; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said G. H., in manner and form aforesaid, did attempt and endeavor to bribe the said E. F., so being constable aforesaid, to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said C. D. under and by virtue of the warrant aforesaid, contrary, &c., and against, &c.

FORM XCII.

Against a Judge of the Circuit Court for Accepting a Bribe.

That A. B., Esq., on, &c., at, &c., in the county aforesaid, was judge of the circuit court in and for the judicial district of said state, duly and legally appointed, qualified, and sworn to discharge and perform the duties of that office; the same being an office of importance and trust concerning the administration of justice within this state, and that the said A. B. being then and there as such judge as aforesaid, sitting at a regular term of said circuit court, began and held within and for the county of, &c., aforesaid, then and there in said judicial district situate, contriving and intending the duties of his said office, and the trust and confidence thereby reposed in him, to prostitute and betray, did then and there unlawfully and corruptly accept and receive of one C. D. the sum of one hundred dollars, as a bribe and pecuniary reward to influence and induce him the said A. B. to (*here state the facts relative to the subject-matter of the bribe*); and that he the said A. B. did then and there unlawfully, wilfully, and corruptly prostitute, violate, and betray, for the bribe and pecuniary reward aforesaid,

so as aforesaid by him the said A. B. in his said office taken, accepted, and received the duties of his said office, and the trust and confidence in him therein and thereby reposed, to the great scandal, dishonor, and prostitution of the public justice of said state, and contrary, &c., and against, &c.

FORM XCIII.

Corrupt Interference with an Election. First Count, Offering Money to a Voter to Vote for a Particular Member of the Legislature.

That before and at the time of the committing of the offenses hereinfter mentioned, to wit, on, &c., the county of C. was and still is a county electing, sending, and returning members to serve for the said county in the legislature of the state of Mississippi aforesaid, to wit, at, &c., aforesaid, in the county aforesaid; and, &c., that before the committing the several offenses hereinafter mentioned, to wit, on, &c., at, &c., an election of a member in the legislature of, &c., as one of the members for the said county of C. was expected to be shortly had and made, which said expected election afterwards, to wit, on, &c., at, &c., was had and made, and, &c., that S. L., late, &c., laborer, unlawfully, wickedly, and corruptly intended to hinder and prevent the free and indifferent election of a member to serve in the legislature, &c., for the said county of C., and by illegal and corrupt means to procure one J. H. S. (who before and at the time of the said election was a candidate to represent the said county of C. in the said legislature) to be elected a member to serve in the said legislature, &c., for the said county of C., did, on, &c., in, &c., unlawfully, wickedly, and corruptly promise (*or* offer) to one G. S. (he the said G. S. then and there, and before and at the time of the said expected election, claiming a right to vote at the election of a member [or members, as the case might be] to serve in the said legislature, &c., for the said county of C.) a large sum of money, to wit, the sum of ten dollars, as a gift, bribe, and reward to him the said G. S., to engage, corrupt, and procure the said G. S. to give his vote, at the said expected election of a member to serve in the said legislature for said county of C., for the said J. H. S., so being such candidate as aforesaid, that the said J. H. S. might be elected at the said election to serve in the said legislature for the said county of C., and

thereupon, afterwards, to wit, on, &c., at, &c., the said S. L. did, in pursuance and fulfilment of said promise, unlawfully, wickedly, and corruptly give, and cause and procure to be given to the said G. S., a large sum of money, to wit, the sum of ten dollars, as a gift, bribe, and reward, to the said G. S., in order and with intent to induce, procure, and corrupt the said G. S., by means of the said gift, bribe, and reward, to give his vote for the said J. H. S. at the said expected election of a member to serve in said legislature for the said county of C., that he the said J. H. S. might be chosen and returned at the said election to serve in the legislature for the said county, to the great obstruction and hinderance of the freedom of election of a member to serve in the said legislature for the said county, to the evil example, &c., and against, &c.

Same. Second Count. Actually Giving a Bribe.

That the said S. L. further unlawfully, wickedly, and corruptly contriving and intending as aforesaid, did, afterwards, to wit, on, &c., last said, at, &c., the said election being then and there so expected as in the first count of this indictment mentioned, unlawfully, wickedly, and corruptly give, and cause and procure to be given to the said G. S. (he the said G. S. then and there, and before and at the time of the said first count mentioned, claiming a right to vote at the election of a member or members, as the case might be, to serve in the legislature, &c., for the said county of C.) a large sum of money, to wit, the sum of ten dollars, as a gift, bribe, and reward to him to engage, corrupt, and procure the said G. S. to give his vote at the said expected election of a member to serve in the said legislature for the said county for the said J. H. S., who was then and there, and before and at the time of the said election so then expected as aforesaid, a candidate to represent the said county in the said legislature, &c., that he the said J. H. S. might be chosen and returned to serve in the said legislature for the said county, to the great obstruction and hinderance of the freedom of the said expected election of a member of the legislature of said county, to the evil example, &c., and against, &c.

FORM XCIV.

Attempt to Influence a Voter by Threatening to Discharge Him from Employment.

That on, &c., at, &c., an election for governor and lieutenant-governor of the state aforesaid, and senators for the district, &c., was then and there duly holden. And the jurors, &c., that one J. N., the said J. N. being then and there a qualified voter to vote at said election, to wit, at, &c., aforesaid, was then and there in the employment of one C. D., late of, &c., in the county aforesaid. And the jurors aforesaid, &c, that the said C. D. did then and there at the said election, unlawfully attempt to influence the said J. N., so being a qualified voter as aforesaid, to give his the said J. N.'s ballot in said election, then and there duly holden, by then and there threatening to discharge the said J. N. from the said C. D.'s employment, against, &c.

FORM XCV.

ILLEGAL VOTING.

That A. C., on, &c., at, &c., at an election for governor and lieutenant-governor of said state, and of representatives for the county of H. in said state, then and there duly holden, within and for the town of J. aforesaid, well knowing himself not to be a qualified voter, did wilfully give in a vote for the officers aforesaid, being the officers to be chosen, against, &c.

Same. Second Count.

That, &c., on, &c., at, &c., at another election for governor and lieutenant-governor of said state, and for representatives in the legislature of said state for the county of H. aforesaid, then and there duly holden, being inquired of by , presiding as , judges of said election, whether he the said defendant had registered, &c., according to law, did then and there wilfully give a false answer to said , to wit, that he the said defendant had registered, &c., according to law; whereas, in truth and in

fact, said defendant had not registered, &c., according to law; and said inquiry was then and there made of said defendant for the purpose of ascertaining his right to vote at said election, and said false answers were returned by him, he the said defendant then and there fraudulently intending to procure his name to be inserted on the voter's list of said county, and to obtain permission then and there to vote at said election, against, &c.

FORM XCVI.

BETTING ON AN ELECTION.

That D. S., late, &c., on, &c., at, &c., did lay a wager and bet with a certain J. C., and that the said D. S. did then and there lay a wager and bet with the said J. C. that a certain J. R. would be elected governor of the state of Mississippi, at an election to be held in said state under the constitution and laws of said state, on, &c., the said J. R. then and there being a candidate nominated for public office, to wit, for the office of governor of said state, contrary, &c., and against, &c.

FORM XCVII.

BETTING ON A HORSE-RACE.

That A. B., late, &c., heretofore, to wit, on, &c., at, &c., unlawfully did bet two dollars with a person to the jurors unknown, upon a horse-race (which said horse-race was not run on a path or track made or kept for the purpose of horse-racing). And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., late of the said county, on, &c., at, &c., did bet and wager bank-notes, being valuable things, with a person to the jurors unknown, upon said horse-race (which said horse-race was not run on a track or path made or kept for the purpose of turf-racing, contrary, &c., and against, &c.

FORM XCVIII.

WINNING MONEY AT CARDS.

That H. H. and T. L., &c., on, &c., at, &c., at an unlawful game at cards, and by laying wagers and betting with one B. C. relating

to the playing of cards, did fraudulently and deceitfully, by means of , win, obtain, and get to themselves of and from the said B. C. twenty dollars of the goods and chattels of the said B. C., and him the said B. C. of his goods and chattels aforesaid then and there fraudulently and deceitfully, in manner and form aforesaid, deceive and defraud, to his great damage, contrary, &c., and against, &c.

FORM XCIX.

DUELLING.

Sending a Challenge, at Common Law. First Count, Sending the Letter containing the Challenge.

That J. S., &c., being a person of quarrelsome and turbulent temper and disposition, and contriving and intending not only to vex, injure, and disquiet one J. N., and do the said J. N. some grievous bodily harm, but also to provoke, instigate, and excite the said J. N. to break the peace, and to fight a duel with and against him the said J. S. on, &c., at, &c., wickedly, wilfully, and maliciously did write, send, and deliver, and cause and procure to be written, sent, and delivered unto him the said J. N., a certain letter and paper writing containing a challenge to fight a duel with and against him the said J. S., and which said letter and paper writing is as follows, that is to say (*here set out the letter with such innuendoes as may be necessary*), to the great damage, scandal, and disgrace of the said J. N., contrary, &c., and against, &c.

FORM C.

For Delivering a Written Challenge as from and on the part and by the desire of E. F.

That A. B., late of, &c., on, &c., at, &c., being of a turbulent, wicked, and malicious disposition, and intending to procure great bodily harm and mischief to be done to one C. D., and to incite and provoke him the said C. D., unlawfully to fight a duel with and against one E. F., on, &c., with force and arms, at, &c., did unlawfully, wickedly, and maliciously deliver, and cause to be delivered, a certain written challenge as from and on the part and by the desire of the said E. F. to the said C. D. unlawfully to fight a duel with and against the said E. F., which said challenge is as follows, that is to say (*set out the challenge with proper innuendoes*), contrary, &c., against, &c.

FORM CI.

Accepting a Challenge.

That C. D., of, &c., at, &c., on, &c., and within, &c., a provocation and challenge to fight with swords and pistols, and other dangerous and destructive weapons, unjustly and unlawfully from a certain A B. did accept, receive, and take, contrary, &c., and against, &c.

FORM CII.

Being a Second in a Duel.

That A. B., of, &c. (being a person regardless of the life of man), on, &c., at, &c., did unlawfully and voluntarily engage in and fight with one M. N. then and there being, with deadly weapons, to wit, with pistols, then and there loaded, &c. (*or other weapons, naming them*), to the great hazard of lives of the said A. B. and M. N., from which duel engaged in as aforesaid, by the said A. B. and M. N., no death did ensue; and that one C. D., then and there being a person regardless of the life of man, then and there, to wit, on, &c., at, &c., did unlawfully, knowingly, and voluntarily become, and then and there unlawfully, knowingly, and voluntarily was second to the said A. B., in engaging in and fighting the duel aforesaid, contrary, &c., and against, &c.

FORM CIII.

ATTEMPTS TO COMMIT OFFENSES.

That A. B., &c., on, &c., at, &c., did attempt to commit an offense prohibited by law, to wit, did attempt with force and arms, on, &c., at, &c., to (*state the offense*), that being an offense prohibited by law, and in such attempt did then and there do a certain overt act towards the commission of said offense, to wit, did then and there, with force and arms (*state the act committed, &c.*); but said A. B. then and there did fail in the perpetration of said offense, and was intercepted and prevented in the execution of the same, against, &c., and contrary, &c.

FORM CIV.

Administering Poison with Intent to Murder.

That A. B., &c., on, &c., at, &c., feloniously and unlawfully did administer to one J. N. (administer to or cause to be taken by any person), a large quantity of a certain deadly poison called white arsenic, to wit, two drachms of the said white arsenic (any poison or destructive thing), with intent then and there, and thereby

feloniously, wilfully, and of his malice aforethought the said J. N. to kill and murder, contrary, &c., and against, &c.

(*Add a count stating that the defendant*) "did cause to be taken by one J. N. a large quantity," &c. (*and if the description of the poison be doubtful, add counts describing in different ways; add one count stating it to be*), "a certain destructive thing to the jurors aforesaid unknown."

FORM CV.

Exhibiting a Deadly Weapon.

That A. B., on, &c., in, &c., then and there having and carrying a certain revolver, which said revolver was then and there a deadly weapon, did in the presence of three or more persons exhibit the same in a rude, angry, and threatening manner, not in necessary self-defence.

FORM CVI.

Against Conductor of a Railway Train, for refusing to a Citizen the privilege of Traveling on said Train.

That A. B., on, &c., in, &c., being then and there the conductor of a certain railroad, to wit, &c., the same being then and there a railroad running through the state of, &c., did deny to one C. D. the right to travel upon said railroad, the said C. D. being then and there a citizen of the United States, and of the state of, &c., contrary, &c. (*Add a count for abridging the right.*) Or did compel a certain person, to wit, one C. D., then and there to occupy a particular car set apart for passengers on account of race or color, contrary, &c.

PLEADINGS.

Not Guilty in Case of Treason or Felony.

And being immediately asked how he will acquit himself of the premises (in case of felony, or of the treason, in case of treason) above laid to his charge, says that he is not guilty thereof, and thereof not good and for ill he puts himself upon the country.

Not Guilty in Misdemeanors, &c., where the Defendant may plead by Attorney.

And the said J. S., by A. B. his attorney, comes into court here, and having heard the same indictment (*or* information) read, says

that he is not guilty of said premises in the said indictment or information above specified and charged upon him; and of this the said J. S. puts himself upon the country, &c.

Similiter, Generally.

And J. K. K., Esq., district-attorney of the said state (*or* commonwealth), who prosecutes for the said state (*or* commonwealth), in this behalf does the like.

Plea that the Defendant has an Addition.

And the said A. B. comes in his proper person, and having heard the said indictment read, says that he, at the time of the taking of the said indictment, and long before, was, and yet is, a yeoman; and that the said indictment does not contain an addition of the said estate of the said A. B., nor of any estate, degree, or mystery of the said A. B.; and this he is ready to verify; wherefore, for want of the addition of the estate, degree, or mystery of the said A. B., in the said indictment, he prays judgment of the said indictment, and that the same may be quashed.

Plea of Misnomer.

And J. L., who is indicted by the name of G. L., in his own proper person cometh into court here, and having heard the said indictment read, says that he was baptized by the name of J., to wit, at the parish aforesaid, in the county aforesaid, and by the Christian name of J. has always since his baptism hitherto been called or known; without this, that he the said J. L. now is, or at any time hitherto hath been, called or known by the Christian name of G., as by the said indictment is supposed; and that he the said J. L. is ready to verify; wherefore he prays judgment of the said indictment, and that the same may be quashed, &c.

Replication to the above Plea.

And hereupon J. N., Esq., district-attorney in the said state, who prosecutes for the said state in this behalf, says that the said indictment, by reason of anything by the said J. L. in his said plea above alleged, ought not to be quashed; because he says that the said J. L., long before and at the time of the preferring of the said indictment, was and still is known as well by the name of G. L. as by the name of J. L., to wit, at the parish aforesaid, in the county

aforesaid; and this he the said J. N. prays may be inquired of by the country, &c.

Plea of Wrong Addition.

And the said A. B., who in and by the said indictment is called by the name and addition, "A. B., late of the parish of K., in the county of M., yeoman," in his own person comes, and having heard the said indictment read, says that at the time of the taking of the said indictment, and long before he the said A. B. was, and ever since hath been, and still is, inhabiting, commorant, and resident in the parish of St. James, in the liberty of Westminster, in the said county of M.; without this, that he the said A. B. now is or at the taking of the said indictment, or at any time before, was inhabiting, resident, or commorant at the parish of K., in the said county of M.; and this he is ready to verify; wherefore, and because he the said A. B. is not called in the said indictment "A. B., late of the parish of St. James, in the liberty of Westminster," he the said A. B. prays judgment of the said indictment, and that the same may be quashed.

Plea to the Jurisdiction.

And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment read, says that the said court here ought not to take cognizance of the (*trespass and assault*) in the said indictment above specified; because, protesting that he is not guilty of the same, nevertheless the said J. S. says that, &c. (*so proceeding to state the matter of the plea. See the precedents*, 1 Went., 10–18; 4 Went., 63. *Conclude thus*): And this the said J. S. is ready to verify; wherefore he prays judgment if the said court now here will or ought to take cognizance of the indictment aforesaid, and that by the court here he may be dismissed or discharged, &c.

Replication to the above Plea.

And hereupon J. N., district-attorney, &c., who prosecutes for the said state in this behalf, says that notwithstanding anything by the said J. S. above in pleading alleged, this court ought not to be precluded from taking cognizance of the indictment aforesaid; because he says that, &c. (*stating the matter of the replication*), and

this he the said J. N. prays may be inquired of by the country, &c. (*or if it conclude with a verification, then thus*): And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may answer to the said indictment.

Special Pleas Generally.

And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment (or information) read, says that the said state ought not further to prosecute the said indictment against him the said J. S.; because he says that, &c. (*so proceeding to state the matter of the plea, and concluding thus*): And this he the said J. S. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

Replication.

And hereupon J. N., district-attorney, &c., who prosecutes for the said state in this behalf, says, by reason of anything in the said plea of the said J. S. above pleaded in the bar alleged, the said state ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says that, &c. (*so proceeding to state the matter of the replication, and conclude thus*): And this he the said J. N. prays may be inquired of by the country. (*Or if it conclude with a verification, then thus*): And this the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may be convicted of the premises in the said indictment above specified.

Rejoinder.

And the said J. S., as to the said replication of the said J. N. to the said plea by him the said J. S., pleaded, that the said state, by reason of anything by the said J. N. in that replication alleged, ought not further to prosecute the said indictment against him the said J. S.; because he sayeth that, &c. (*so proceeding to state the matter of the rejoinder, and concluding thus*): And of this he the said S. puts himself upon the country. (*Or if it be necessary to conclude with a verification, the conclusion may be in the same form as in a plea.*)

Plea of Autrefois Acquit.

And the said William Sheen being brought to the bar of the court, and having heard the said indictment read and the matters therein contained, says that he ought not to be put to answer the said indictment, he having been heretofore in manner of law acquitted of the premises in and by the said indictment above specified and charged upon him, and for the plea to the said indictment he says, that heretofore, to wit, at, &c. (*here set forth the caption of the session verbatim*), he the said William Sheen was duly arraigned upon a certain indictment, which charged him the said William Sheen by the name and description of

William Sheen, late, &c., in the county of , laborer, not having the fear, &c. (*it here set out the former indictment verbatim*), to which said last-mentioned indictment he did then and there plead not guilty, and thereupon a jury then and there duly summoned, empaneled, and sworn to try the said issue so joined between the said state and the said William Sheen, upon their oaths did say, that the said William Sheen was not guilty of the said felony and murder by the said indictment supposed and laid to his charge; whereupon it was then and there considered by the said court that the said William Sheen should go therefore acquitted, without day, as appears by the records of the said proceedings now here remaining in court. And the said William Sheen avers that the said William Sheen mentioned in the former indictment, and he the said William Sheen who is charged by the present indictment, are one and the same person, and not divers and different persons, and that the said infant mentioned in the said first indictment, and the male child in the present indictment mentioned, are one and the same male child, and not divers and different children; and the said William Sheen further avers, that the felony and murder in the said former indictment mentioned, and the felony and murder in this present indictment mentioned, are one and the same felony and murder, and not divers and different felonies and murders.

And the said William Sheen further avers, that the male child described by the name of Charles William Beadle in the said former indictment mentioned, was as well known by the said name of Charles William Beadle as by any of the several names and descriptions of Charles William, William Billy, Charles or

William Sheen, or a certain male child, or a certain male bastard child, as he is in and by the present indictment described; and this he is ready to verify; wherefore he the said William Sheen prays the judgment of the court here, if he ought to be put further to answer this present indictment; and whether the said state ought further to prosecute or impeach him the said William Sheen, on account of the premises in this present indictment contained; and that he may be dismissed the court and go without day.

Autrefois Acquit. Another Form.

And the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, in their own proper persons, now come into court here, and having heard the said indictment read and the matters therein contained, say that they ought not to be put to answer the said indictment, they having been heretofore in due manner of law acquitted of the premises in and by the said indictment above specified and charged upon them, and for plea to the said indictment they say that the said ought not further to prosecute the said indictment against them, because they say that heretofore, to wit, at the (*here set forth the caption of the court verbatim*), the said Robert Courtice Bird stood indicted, and were duly arraigned before a certain indictment which charged the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, stood indicted, and were duly arraigned upon a certain indictment which charged the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, by the names and descriptions of Robert Courtice Bird, late of the parish of Buckland Brewer, in the county of Devon, laborer, and Sarah the wife of the said Robert Courtice Bird, late of the same parish, for that the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, &c. (*setting out the indictment in full.*) And the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, further say, that the said felony and murder so charged upon them in the said last-mentioned indictment as aforesaid, included divers assaults therein supposed and alleged to have been made and committed by the said Robert Courtice Bird, and the said Sarah the wife of the said Robert Courtice Bird, against the person of the said Mary Ann Parsons, in the said

indictment named. And the said Robert Courtice Bird, and the said Sarah the wife of the said Robert Courtice Bird, further say that they did then and there respectively plead not guilty to the said last-mentioned indictment, and that they were thereupon then and there, in due form of law, respectively tried upon the said last-mentioned indictment by a jury of the said county, then and there in due form of law summoned, empaneled, and sworn to speak the truth of and concerning the premises in the said last-mentioned indictment mentioned, and to try the said issues so joined between our sovereign lady the queen and the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, respectively as aforesaid, and which said jury upon their oaths did then and there say, that the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, respectively, were not guilty of the premises in the said last-mentioned indictment specified and charged on them respectively as aforesaid, as the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, by their pleas to the said last-mentioned indictment respectively alleged, whereupon it was then and there considered by the said last-mentioned court that the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, of the premises aforesaid, in the said last-mentioned indictment specified and charged on them respectively as aforesaid, should be discharged and go acquitted thereof without day, as by the record of the said proceedings now here appears. And the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, further say, that the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, now here pleading, and the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird, in the indictment aforesaid named and thereof acquitted as aforesaid, are respectively the same identical persons respectively, and not other or different persons respectively. And that the said Mary Ann Parsons in the said last-mentioned indictment named is the same identical Mary Ann Parsons as is named in the indictment to which the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, are now here pleading; and that the said assaults so included in the said felony and murder so charged upon the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert

Courtice Bird, in the said indictment in the plea mentioned in this behalf, and therein supposed and alleged to have been made and committed by them against the person of the said Mary Ann Parsons as aforesaid, are the same identical assaults, beating, ill-treatings, and woundings respectively as in the said indictment to which the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, are now here pleading, are respectively supposed and alleged to have been made, done, given, and committed respectively by the said Robert Courtice Bird, and the said Sarah the said wife of the said Robert Courtice Bird, respectively, and not other or different. Wherefore they pray judgment of the court here whether the will or ought further to prosecute, impeach, or charge them on account of the premises in the said indictment, to which they are now here pleading, continued and specified, and whether they ought to answer thereto respectively, and that they may be dismissed this court without delay.

(*Replication to Autrefois Acquit. To be made Ore Tenus.*)

And J. K., Esq., who for the said prosecutes on this behalf, says that the said ought not to be barred from further prosecuting the said indictment, because he saith that the said W. S. was acquitted upon the said indictment in this said plea mentioned, and although true it is that the said infant in the said former indictment mentioned, and the male child in this present indictment mentioned, are the same child and not another and different child, yet for replication in this behalf he says that the said male child was not known as well by the name of C. W. B. as by any or either of the several names by which he is named in the present indictment; and this the said J. K., Esq., on behalf of the said prays may be inquired of by the country.

Plea that defendant was duly charged, examined, and tried for murder of the deceased before a court legally constituted, and upon the trial and examination was duly and legally acquitted of the said murder and felony with which he stood charged, and was adjudged by the court not guilty thereof.

And the said S. M. for plea (by leave of the court) saith, that he ought not now to be charged with the murder and felony aforesaid,

charged upon him in the indictment aforesaid, because he saith that he the said S. M., by the name and description of S. M., heretofore, to wit, at a court of aldermen of the borough of Norfolk, summoned according to law for the examination of the said S. M., for the murder and felony aforesaid, and held on the thirty-first day of May, in the year of our Lord one thousand eight hundred and eleven, at the court-house of the borough aforesaid, before W. B. L., mayor, J. N., recorder, W. V., L. W., M. K., J. E. H., R. E. L., and M. K., jr., aldermen of the said borough, was duly charged, examined, and tried, for having on the twenty-fifth day of May, one thousand eight hundred and eleven, between the hours of six and eight o'clock on the morning of that day, in the stone-house of L. B., in the said borough of Norfolk, feloniously, wilfully, and of his malice aforethought, killed and murdered the said R. B., who was then and there in the peace of God and of the commonwealth, and that he the said S. M. upon this trial and examination was duly and legally acquitted by the said court of the said murder and felony with which he was then and there so charged, and was adjudged by the said court not to be guilty thereof; and that he the said S. M. is ready to verify and prove by the record of the said borough court of Norfolk. And the said S. M. further saith that the said R. B. named in the said indictment, and the said R. B. named in the said record of acquittal, are one and the same and not different persons; that he the said S. M. named in the said indictment, and the said S. M. named in the said record and acquittal as aforesaid by the said court of felony and murder aforesaid, are one and the same and not different persons, and that the felony and murder charged upon him the said S. M. before the said court, and the felony and murder charged upon him the said S. M. in the indictment aforesaid, are one and the same and not different felonies; and this he is ready to verify; wherefore since he the said S. M. hath already been heretofore acquitted of the felony and murder of the said R. B. aforesaid, he prays the judgment of the court here, if he the said S. M. should be charged again with the same felony and murder of which he hath once already at another time been acquitted.

Autrefois convict, plea of, where the Original Indictment on which the Defendant was convicted was one for Arson, and the Second Indictment was for Murder in Burning a House, whereby one J. H. was Killed, &c.

And the said S. C., in his own proper person, cometh into court here, and having heard the said indictment read, saith that the said state of Mississippi ought not further to prosecute the said indictment against him the said S. C., because he saith that heretofore, to wit, at (*here insert a general description of the court, and the time*), holden at , in and for the county of , of the term of July, A. D. &c., it was by the jurors of the state of Mississippi, for the body of the county of , upon their oaths presented, "that (*here recite indictment*) then, there, and thereby described as S. C., late of, &c., in the county of , not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of April, A. D. one thousand eight hundred and thirty, with force and arms, at the township aforesaid, and within the jurisdiction of the said (*here insert the style of the court*) wilfully and maliciously did burn a certain dwelling-house of one R. S. there situate. And the jurors aforesaid, upon their oaths aforesaid, did further present that C. C. and J. V. G., late of, &c., aforesaid, before the said arson was committed in form aforesaid, to wit, on the twelfth day of February, in the year aforesaid, with force and arms, at the town aforesaid, in the county and within the jurisdiction aforesaid, did unlawfully, wilfully, and maliciously aid, counsel, and procure the said S. C. to commit the said arson, in manner and form aforesaid, against the form of the statute in such case made and provided, and against the peace of the said state of Mississippi, the government and dignity of the same.

Which said indictment is indorsed a true bill, and signed by D. J. C., Esq., as foreman, and by J. W. M., Esq., as district-attorney of said court.

And the said S. C., in his own proper person, further saith that at (*here insert the style of the court*), holden at , in and for the county of , of the term September, A. D. one thousand eight hundred and thirty, present the Hon. G. K. D., justice, and J. V., D. T., J. S., and S. C., Esqs., judges, he the said S. C., together with C. C. and J. V. G., were

charged on the above recited indictment for arson, and their plea to the same being demanded, they the said S. C. and J. pleaded thereto not guilty; whereupon the said court remanded them the said S. C. and J. to prison.

And the said S. C., in his own proper person, further saith that afterwards, to wit, on Monday, the fourth day of October, A. D. one thousand eight hundred and thirty, before the court of, &c., and in the September term of said court, on motion of J. W. M., Esq., district-attorney of the county of , the said court ordered on the trial of the said S. C. and J. on said indictment for arson.

Whereupon, the sheriff having returned a panel, the following persons appeared and were sworn, viz.: A. C., &c. After hearing the testimony and a charge from the court, the jury retired to consider of their verdict, with bailiff S. F. sworn to attend them. After some time the said jury returned into court and said they had agreed on the verdict, and by A. C., their foreman, said they found the said S. C. guilty in the manner and form as he stood charged, and as to C. C. and J. V. G., not guilty in manner and form as they stood charged, and so said they all, as by the record thereof more fully and at large appears, which said judgment still remains in full force and effect, and not in the least reversed or made void. And the said S. C. in fact saith that he the said S. C. and the said S. C., so indicted and convicted as last aforesaid, are one and the same person, and not other and different persons, and that the wilful and malicious burning a certain dwelling-house of one R. S. (as in the indictment for arson is mentioned, and on which he has been so as aforesaid convicted) and the wilful and malicious burning a certain dwelling-house of one R. S., whereby one J. H., in the said dwelling-house then and there being, before, at, and during the same burning, was then and there, by reason of the said burning, so committed and done by the said S. C. in manner aforesaid, mortally burned and killed, as described in the above indictment for murder against him (in the first count thereof), are one and the same wilful and malicious burning of the dwelling-house of the said R. S., and not other and different burnings or arsons.

And the said S. C. further in fact saith that the wilful and malicious burning a dwelling-house of one R. S., of which he the said S. C. was so indicted and convicted as aforesaid, and his convicting

and intending one J. H., then being in a certain dwelling-house of one R. S., in the county and state aforesaid, feloniously, wilfully, and of his malice aforethought, to burn, kill, and murder, and his wilfully and maliciously setting fire to and burning the said dwelling-house, the said J. H. then and there, before, at, and during the said burning being in the said dwelling-house, and that he the said S. C. in so setting fire to and burning the said dwelling-house as aforesaid, there and then feloniously, wilfully, and of malice aforethought did mortally burn the body of the said J. H., by means of which said mortally burning of the body of the said J. H. as aforesaid, he the said J. H. did die, of which he is now indicted, as alleged in the second count of said indictment, are one and the same wilful, malicious burnings of the dwelling-house of the said R. S., and not other and different burnings or arsons.

And of this he the said S. C. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified (*here follows the plea of not guilty*).

Replication to Said Plea.

And J. W. M., who prosecutes for the state of Mississippi in this behalf, as to the said plea of the said S. C., by him first above pleaded, saith that the same and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said state from prosecuting the said indictment against him the said S. C., and that the said state is not bound by the law of the court to answer the same, and this he, the said J. W. M., who prosecutes the aforesaid, is ready to verify; wherefore,—

For want of a sufficient plea in this behalf, he, the said J. W. M., for the state of New Jersey, prays judgment, and that the said S. C. may be convicted of the premises in the said indictment specified.

Rejoinder to said Replication.

And the said S. C. saith, that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the state of Mississippi from prosecuting the said

indictment against him the said S. C., and the said S. C. is ready to verify and prove the same, as the said court here shall direct and award; wherefore, inasmuch as the said J. W. M., who prosecutes for the said state of Mississippi, hath not answered the said plea, nor hitherto in any manner denied the same, the said S. C. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.

Plea of Once in Jeopardy.

That on the said indictment at the said court of on Thursday, the 12th of April aforesaid, the said defendant, in due form of law, was arraigned and pleaded not guilty of the premises contained in the said indictment, and for his trial put himself upon God and his country, and was by the said state, in due form of law, placed on his trial before a jury of the said country. And the said J. C. further says, that on the twenty-first, twenty-second, and twenty-third days of April aforesaid, the witnesses were examined in due form of law before the said court and jury, as well as on behalf of the said commonwealth as him the said defendant; that the counsel for the commonwealth and the defendant then addressed the court and jury in due form of law; that on the evening of the twenty-third of April aforesaid, the court charged the jury relative to the premises contained in the said indictment as set forth, and that the said jury then, according to law, retired to deliberate on their verdict; that on Monday, the twenty-fifth day of April aforesaid, at ten o'clock in the forenoon of that day, the said jury came into the said court and answered to their names, and declared that they had not agreed upon their verdict, and that they did not think they were likely to agree upon their verdict; that two of the jury, viz., E. F. and A. H., then and there stated that they were unwell, and one of the jury, viz., E. F., then and there declared that if he were much longer confined in his present state of privation his life would be endangered; that one of the jury, E. F., being duly sworn before the said court, declared that he was seventy-six years of age, that the health of him the said E. F. was greatly impaired by an attack of illness, from which he the said E. F. had only been relieved about a month, that he the said E. F., from his peculiar state of privation and suffering, was so ill and feeble that

he could not walk into court without assistance, and that he the said E. F. firmly believed that if he should be compelled to continue on the said jury any further length of time, under his then state of privation and restriction, the life of him the said E. F. would be in danger. And A. H., another of the said jury, being duly affirmed according to law, declared that he was then quite ill, and that he had been confined all the month of December then next preceding, with bilious fever; that the effect of this attack still left his frame debilitated, and that he firmly believed that his health would be in danger by being kept longer on the jury under his then state of privation and restriction, as ordered by the court; that the jury were then ordered by the court to withdraw to their room where they had been deliberating, and Dr. J. K., a physician of great respectability, was then and there directed by the court to visit the said jurors who alleged that they were sick; that the said Dr. J. K. did so visit the jurors in their room, in the absence of the defendant and his counsel, and without their consent, and returned to the said court, and being then for the first time sworn, did depose that he had attended the said E. F. about a month previous to the said time, the said E. F. having then a disease of the brain, and that the life of the said E. F. would, in the opinion of the said J. K., be endangered in his present state of privation and restriction, as it might produce a return of the disease. And the said Dr. J. K. then and there further deposed, as his opinion to the said court, that the life of the said A. H. was not in immediate danger, but that he was ill, and that his health would be endangered if he continued to remain in his present state of privation and restriction. And the said J. C. further says, that at half-past twelve o'clock in the afternoon of the same day the said court ordered the said jury to be brought into court, and the said jury being then and there asked if they had agreed upon their verdict, answered that they had not. And the said court then and there, without the consent of the said J. C., ordered the said jury to be dismissed, the said court declaring then and there, their opinion that a case of necessity for the discharge of the said jury, as contemplated by the supreme court of this state, in the case of the State v. Cook, had been made to appear. And the said J. C. further says, that during all this time, viz., from Saturday, the twenty-third of April, from half-past ten o'clock of the evening of that day, until Monday, the twenty-fifth day of April, at half-past

twelve o'clock in the afternoon of that day, the said jury were kept by order of the said court without meat or drink, but had the use of fire and candles, and that during the trial the said jury were allowed to eat and drink. And the said J. C. further says, that after the said jury had been without meat or drink for the space of twenty-four hours, the said court then and there, after asking the commonwealth and the defendant, authorized the jury to take some refreshments, if a majority of the said jury would agree to the same, but that a majority of the jury would not agree to the taking of such refreshments at that time, until the verdict was agreed upon; after which declaration the court refused to grant permission to any one of the said jury to take any food or refreshments whatever. And the said J. C. further says, that during the time of the privations and restrictions of the said jury, the said defendant prayed the said court that the said jury, or any of them, might take food and refreshments; and after the declaration of the said jurors that they were sick, and the said defendant then prayed that the said sick jurors might be allowed food and refreshments. All which said praying of the said defendant the said court then and there refused. And the said J. C. further says, that he the said J. C. now here pleading, and the said J. C. in the said indictment last mentioned, is the same identical person, &c.

Plea that six of the grand jurors by whom the bill was found, were not duly qualified.

That J. N. C., R. M. C. S., H. B., J. F., T. J. H., and J. B., six of the grand jurors by whom the said indictment was found and returned into the said court, at the said April term thereof, were not all of them the above-named six jurors, nor any one of them, at the time they so acted and at the time the said indictment was found and returned, duly and legally qualified to act as such grand jurors; in this they, the said six grand jurors, nor any one of them, had not then and there been drawn by the clerk and sheriff of the county of Warren aforesaid, either at a regular term of the said circuit court (next preceding the said April term of the said circuit court), there in open court, or by the said clerk and sheriff in the presence of the judge of probate of the county of Warren aforesaid, sixty days next before the said April term of the said circuit court of the county of Warren aforesaid, as jurors liable to serve

out for the first week of the aforesaid circuit court, at the said April term thereof, then and there from a list of the names of all the freeholders (being citizens of the United States, and householders of the county of Warren aforesaid) as liable to serve as jurors in the circuit court of the county of Warren aforesaid, as returned either in the term time of the said circuit court or to the clerk thereof, at his office in vacation, by the assessor of taxes of the county of Warren aforesaid; nor were all of them the above-named six jurors, nor was any one of them then and there summoned as persons liable to serve as jurors for the first week of the said April term of the said circuit court of Warren county aforesaid, then and there, by virtue of a special writ of *venire facias* then and there awarded by the said circuit court at the said April term thereof, directing the said sheriff of the said county of Warren to summon persons there liable to serve as jurors at the said April term of the said circuit court, for the first week thereof; nor were all or any of the above-named six jurors then and there summoned as tales jurors by the said sheriff, as liable to serve as such jurors for the first week of the said term of the said court, then and there by virtue of an order of said court; nor had all and every one of the jurors of the regular panel of jurors summoned and in attendance at the said term of the said court for the first week thereof; nor had the regular panel of the jurors summoned and in attendance upon the said court at the said term thereof, as liable to serve as jurors for the first week, been gone through with, then and there to constitute a grand jury to serve at the said term of the said court, by lot, when the names of the said six grand jurors above-mentioned were drawn, by lot, to serve as grand jurors for the said term of said circuit court; nor were all the above-named six grand jurors, nor any one of them, summoned by the sheriff of the said county from the by-standers, then and there to serve as jurors for the first week of this said term of said court. (*Conclude as ante, &c.*)

Plea that goods which defendant was charged with rescuing from the sheriff, who had seized them under an execution against a third party, were in fact, at the time, the property of and in the possession of the defendant.

And now said A. K., protesting that he is not guilty of the premises charged in said indictment, and reserving a right to

waive this plea and plead anew at the court above. demands judgment of said indictment, and all and every part thereof, and for plea says, as to the force of arms and whatever is against the peace in first and second counts in said indictment mentioned, and the wounding therein supposed to be done, he is not guilty thereof in manner and form as he is charged therewith in said indictment, and of this he puts himself upon the country. And as to the residue of the offenses charged in said indictment, and as to the assaulting, beating, bruising, evil treating, and forcibly and with a strong hand depriving of the care, custody, and keeping and possession of goods and chattels, the said K. says that said commonwealth ought not to prosecute and charge him therefor, because he says that said D. D. B., in said indictment mentioned, and one S. F. C., before and on the said second day of October last, and at the time when said offense is supposed to have been committed, were lawfully possessed of a certain shop in Congress Street, in said Boston, and of certain goods and chattels then and there in said shop, being the same goods and chattels in said second count in said indictment mentioned, which said goods and chattles were then and there the proper goods and chattels of said B. and C., and being so possessed and seized thereof, the said T. J. S., just before the said time, when, &c., to wit, on said second day of October, was unlawfully in said shop, and with force and arms making a great noise and disturbance, and at said time, when, &c., stayed and continued therein making such noise and disturbance, without leave or license, and against the will of said B. and C., and then and there, with force and arms, and with a strong hand, kept said B. and C. out of possession of said shop and of said goods and chattels, and then and there, and during a long time, disturbed said B. and C. in the use and enjoyment of said shop and of said goods and chattels, and greatly annoyed said B. and C. in the peaceable possession and enjoyment of said shop and of said goods and chattels, and thereupon the said B. then and there requested said S. to cease from making said noise and disturbance, and to go and depart from said shop, and to give up and relinquish said goods and chattels to said B. and C. the lawful owners thereof, which said S. then and there refused to do. Whereupon the said B. did specially pray and request said K. to aid and assist him the said B. in the defense of the possession of said shop and of said goods and chattels, gently laid their hands

upon said S. in order to remove him from said shop, and did then and there remove said S. from said shop and from said goods and chattels, as they lawfully might do for the cause aforesaid, doing the said S. no unnecessary harm or injury; all which are the same assaulting, beating, bruising, and evil treating, and with force and a strong hand said S. of the care, custody of the possession of said goods and chattels, in first and second counts mentioned, and therein supposed to be done; and this said K. is ready to verify; wherefore he prays judgment of said indictment, whether said commonwealth ought or can prosecute him for the premises, and that he may be discharged thereof without day. A. K.

Replication.

And now J. T. A., district-attorney of said state, here in court agrees to the above reservation as to so much of said plea as that whereof the said A. puts himself on the country for the commonwealth doth the like. And so to the rest and residue of said plea, he says, that the said state ought not, by reason of anything therein contained, to be precluded from prosecuting the said A. for the several matters and things in said indictment charged upon him; because he says that at the time in said indictment alleged, he the said A. committed the several assaults, batteries, and trespasses in said indictment set forth, of his own wrong, and without any such cause as he hath in pleading alleged; and this he prays may be inquired of by the country.

And the said K. doth the like.

PRECEDENTS OF ENTRIES.

FORMS OF ENTRIES ON THE MINUTES IN CRIMINAL PROCEEDINGS IN THE CIRCUIT COURTS, WITH INSTRUCTIONS FOR MAKING UP THE FINAL RECORD, AND TRANSCRIPT FOR THE SUPREME COURT ON WRITS OF ERROR. INTENDED FOR THE USE OF CLERKS.

CAPTION OF THE MINUTES.

THE STATE OF MISSISSIPPI, }
County. }

Pleas and Proceedings before the Circuit Court of County

ENTRY 1.

Be it remembered, that a circuit court for the said county was begun and held at the court-house thereof, in the town of on the Monday of 18 , being the day of 18 , and the day and place appointed by law for holding said court. There were present the Hon. A. B., judge of the judicial district of said state, presiding; A. C., district attorney for said district; A. D., sheriff of said county; and A. E., clerk of said court.

The sheriff returned into court a certified list of the names of persons selected by the board of supervisors of said county to serve as grand jurors at the present term of said court, with his return thereon, which is in the words and figures following, to wit: (*Here insert the copy of the list and certificate and the return of the sheriff.*)

From the number of persons so selected, summoned, and appearing, being good and lawful men of said county, and citizens of the United States, the following named persons, being duly examined by the court and found qualified, were by the court elected, em-

paneled, sworn, and charged as grand jurors to inquire in and for the body of said county and state, being in number as follows, to wit: (*Here insert the names of the jurors.*)

Of the number so elected, the court appointed A. F. foreman of the grand jury, and the oath prescribed by law was administered to him in open court, and in the presence and hearing of the other jurors, who took the same oath which their foreman had taken before them; and the said grand jury so elected, empaneled, and sworn, after receiving the charge of the court touching their duties, retired to consider the same.

ENTRY 2.

In the circuit court of county, term 187 , day of said term, being the day of 187

The grand jurors of the state of Mississippi elected, empaneled, sworn, and charged to inquire in and for the body of the county aforesaid, came into open court attended by their proper officer, there being then and there present at least twelve of their number, and upon their oaths and through their foreman presented to the court the following true bill of indictment (or bills, if there be more than one), which is indorsed a "true bill," and signed by the said foreman, and entered and signed by the clerk of said court as follows, to wit:

THE STATE OF MISSISSIPPI, No. , *vs.* *Murder.* A. G.	(Indorsed) a true bill. A. F., foreman of the grand jury, prosecutor.

Filed this day of 187

A. E., *Clerk.*[1]

(*This entry serves for all the bills presented at the time, and they are numbered and entered in their order on the minutes. The final record, however, contains but the particular bill, and speaks of that one alone.*)

And the same so presented, indorsed, and signed, was received by the court and filed by the clerk, with his indorsement of filing thereon.

[1] This form, which in the final record is followed by the indictment, has been judicially approved. Greeson v. State, 5 H., 253; Greer v. State, 26 Miss., 657; Josephine v. State, 40 Miss., 614.

ENTRY 3.

THE STATE OF MISSISSIPPI, No. , vs. A. G. *Murder.* } In the circuit court of county, term 187 , day of said term being the day of , 187 .

And now comes the district attorney who prosecutes for the state, and A. G., the defendant, in his own proper person, and being arraigned and charged on the indictment aforesaid, pleaded not guilty, and for his trial put himself upon the country, and the district attorney, on behalf of the state, doth the like, and thereupon it is ordered by the court that the sheriff of this county and the clerk of this court draw in open court according to the statute in such case made and provided,[1] names of persons, *to* serve specially as jurors in this case, and thereupon the said sheriff and clerk proceeded in open court to draw as ordered, when *the* following names were drawn, to wit:

(*Here insert the names drawn.*)

And thereupon it is ordered by the court that the clerk issue and deliver to the sheriff the writ of *venire facias*, commanding him to summon the persons so drawn as aforesaid, to be and appear before this court at 10 o'clock A. M. on , the day of , 18 , being the day of this term of the court, to serve specially as jurors in the trial of this case,[2] and that the sheriff serve on the defendant or his counsel a copy of the writ of *venire facias*, together with his return thereon, showing the names of the persons so summoned, and also a copy of the indictment aforesaid, at least one entire day before the said day of (the return day of the *venire*).

ENTRY 4.

THE STATE OF MISSISSIPPI, No. , vs. A. G. *Murder.* } Term 187 , day of said term, being day of 18

And now comes the district attorney who prosecutes for the state, and A. G., the defendant, in his own proper person, and also come the jury of good and lawful men taken from the persons

[1] Art. 295, Code, 690. [2] Art. 294, Code, 690.

summoned by the *venire facias* aforesaid, and otherwise chosen according to law, to wit:

(*Insert here the names of the jurors.*)

who were elected, tried, and sworn to well and truly try and true deliverance make between the state of Mississippi and A. G., the prisoner at the bar, and a true verdict give according to the evidence; after hearing the evidence, and receiving the instruction of the court, retired in the care of their bailiff to consider of their verdict, and having duly considered the same upon their oaths in open court, returned the following verdict, viz.: We, the jury, find the defendant guilty, as charged in the bill of indictment.[1] It is, therefore, ordered that the defendant be remanded to await further proceedings.

ENTRY 5.

THE STATE OF MISSISSIPPI,
No. , *vs. Murder.*
A. G.

Term, 187
day of said term, being
the day of 187 .

MOTION FOR A NEW TRIAL.

The defendant by his counsel moves the court for a new trial in this case for the following reasons:

(*Here set forth the grounds of the motion as they appear on the motion docket.*)

and thereupon comes the district-attorney, who prosecutes for the state, and the defendant in person, being placed at the bar of the court in custody of the sheriff, and thereupon came on to be heard the defendant's motion for a new trial, which being argued by counsel and considered by the court, it is considered by the court that said motion be and the same is hereby overruled, and a new trial refused.

ENTRY 6.

THE STATE OF MISSISSIPPI,
No. , *vs. Murder.*
A. G.

Term, 187 .
day of said term, being
the day of 187 .

Came the district-attorney, who prosecutes for the state, and the defendant in his own proper person being placed at the bar of the court, was asked by the court if he had anything further to say why the sentence of the law shall not be pronounced against him, and the defendant says he has nought to say. It is therefore con-

[1] See Dyson v. State, 26 Miss. The oath above given is strictly accurate, and the form is taken from Chitty Crim. Law.

sidered by the court that for such his offence of murder he be taken hence to the common jail of the county, to be safely kept in close confinement until , the day of , 187 ; and that on the "said day of 1871 he be taken from said jail by the said sheriff, and within the inclosure around said jail, if there be such, and if not to the place of execution, and there, between the hours of 10 o'clock A.M. and 4 o'clock P.M. he be hanged by the neck until he be dead. It is further ordered by the court that the sheriff of this county execute this sentence."

The final record is more elaborate than the entries which are made in the minutes of the court. It contains all of such entries, and in addition thereto the indictment, pleadings, instructions, and, according to a very safe practice in this state, the venire facias in capital cases, with the return of the sheriff thereon, and brief recitals, which though not varying or contradicting the entries in the minutes, serve to connect them. The transcript made by the clerk on a writ of error is but a copy of this final record.

The final record is prefaced by the following entry, which is of the date of the final judgment, and precedes entry No. 1 *in the foregoing form:*

CAPTION OF THE FINAL RECORD.

"Criminal proceedings in the circuit court of county and state of Mississippi, begun and held at the court-house, in the town of , in said county, on the Monday of , 187 , before the Hon. A. B., judge of the judicial district of said state."

(*Here follows the caption of the Minutes, Entry No.* 1.)

In the final record, the entry No. 1 should state that the true bill found was against A. G. for the murder of ——.

[*Entry* No. 2 *is preceded by the following recital, which follows immediately after the closing word of the caption* No. 1.] "And afterwards, to wit, on the day of , 187 , being the day of the term aforesaid, the following proceedings were had and entered on the minutes of said court, to wit:

(*Insert here Entry No.* 2.)

[*at the close of entry* No. 2, *the following recital occurs in the final record*] "which said indictment, with the indorsements thereon, is in the words and figures following, to wit:

(*Here insert the indictment and the indorsements and signatures.*)

[*Entry* No. 3 *is preceded by the following recital, which is inserted immediately after the indictments and indorsements.*]

"And afterwards, to wit, on the day of , 187 , being the day of said term, the following orders and proceedings were had and entered on the minutes of said court, to wit:[1]

(*Here insert Entry No.* 3.)

[*a like recital should precede every subsequent entry, and the form above will serve as a guide. Immediately following entry* No. 3 *is this recital*]:[2] "and afterwards, to wit, on the day and year last aforesaid, the clerk of said court issued the writ of *venire facias*, so ordered as aforesaid, which said writ, together with the return of the sheriff written thereon, is in the words and figures following, to wit:

"THE STATE OF MISSISSIPPI, }
County. }

"To the sheriff of said county, greeting:

"We command you to summon

(*Here insert the names of the persons drawn.*

"if to be found in your county, personally to be and appear before the judge of the circuit court of said county now in session, at the court-house in the town (or city) of , on of the term of this court, being the day of said term, and the day of , 187 , to serve as jurors specially in the case of the state against A. G., and that you serve a copy of this *venire facias*, with your return thereon, and a copy of the

[1] This form is in general use in this state, and there being no legal objection to it, has been selected. The form given in the appendix to Blackstone's Commentaries, and to be found elsewhere, states the case and term but once, and omits the words "The following order was made and entered on the minutes."

The case being once stated, the connecting recital preceding all subsequent entries is as follows:

"And afterwards, to wit, on the day of , 18 , being the day of the term aforesaid of the court aforesaid, came the district-attorney, &c.," (*leaving out the caption of the entry in the minutes.*)

The object of stating the case and the term in full in each separate entry in the minutes, is to distinguish the case from others which are pending and in progress at the same term, and in which entries are made in the minutes. The final record containing but the one case gives a connected narrative, and one statement of it at the beginning suffices.

This form of recital is simple and orthodox.

[2] *Venire facias.*

indictment in this cause, on the said defendant A. G., or his attorneys, at least one entire day before the said day of , 187 .

SEAL. "Given under my hand, and the seal of said court, the day of , 187 .

A. E., *Clerk.*

"Upon which *venire facias* the sheriff made his return in these words and figures.

(*Here insert the return in full.*)[1]

The trial usually begins on the return day of the venire facias. Following the sheriff's return on the venire facias, and immediately preceding Entry No. 4, *occurs the usual recital, with the appropriate duty, and in all other respects like that which precedes Entry* No. 3, *and following it occurs Entry* No. 4, *as it is in the minutes.*[2]

The instructions given and refused by the court, which are by law made part of the record, may be inserted immediately after the verdict, and are preceded by the following recital:

THE STATE OF MISSISSIPPI,
No. , vs. *Murder.*
A. G.

On the trial of this cause, and before the jury retired to consider of their verdict, the following instructions for the jury were asked by the district attorney on the part of the state, and those granted are indorsed by the clerk "Granted," and those refused are indorsed "Refused," in the words and figures following, to wit:

(*Here insert the instructions for the state, with the indorsements thus: "Granted," A. E., clerk.*[3] *"Refused," A. E., clerk.*)

And the following instructions were asked by the defendant, and those granted are indorsed by the clerk "Granted," and those re-

[1] The cases of Green v. The State, 28 Miss., 687, citing 1 How., 253, deciding that the *venire* is not part of the record, is not thought to embrace the special *venire* in a capital case. It is a writ issued in the particular case and returned into court. Its absence from the record would be ground for a motion in arrest of judgment. The issuance and return is best shown by the writ itself. See The People v. McKay, 18 Johnson, 212, in which it is held to be part of the record in a motion in arrest of judgment.

[2] Art. 161, Code, 504.

[3] The instructions appearing in the record, with the words written at the bottom by the judge, "Given," "Refused," will not be noticed on writ of error. The indorsements must be signed by the clerk. Swan v. West, 41 Miss., 104.

fused are indorsed "Refused," in the words and figures following, to wit:

(*Here insert the defendant's instructions, with the proper indorsements signed by the clerk.*)

Exceptions taken during the trial, or on the granting or refusing instructions, are not noted on the minutes nor in the recitals of the final record. They are contained in bills of exceptions taken and allowed by the court, and which, as they appear written and signed, are merely copied into the final record, verbatim. Their proper place in the record is rather matter of method and convenience. To prevent confusion, it is recommended that bills of exceptions be incorporated in the record after the verdict and motion for new trial, and before the entry of final judgment.[1] *This gives the final record proper in a connected form. It often occurs that the bill of exceptions contains entries from the minutes, instructions, and motions for new trial, &c., with the order overruling them; and clerks sometimes suppose that, as these entries, instructions, and orders are once in the record, in the bill of exceptions, they need not otherwise appear. It should be borne in mind, that no part of the record proper can be supplied by the bill of exceptions.*

The introduction of the bill of exceptions in the record is preceded by a recital, as follows:

On the trial and proceedings in this cause, the following bill (or bills, as the case may be) of exceptions was tendered to the court, allowed, signed, and ordered to be made part of the record in this cause, to wit:

(*Here insert the bill or bills in their order.*)

And following these with the proper recital, as before indicated, comes Entry No. 6, *which completes the final record.*

If a writ of error should be applied for and granted, the transcript which is made out for the supreme court should contain copies of the petition, fiat of the judge granting the writ, the bond, and writ of error, which are introduced with a recital, as follows:

Afterwards, to wit, on the day of 18 , the following petition and fiat of the judge thereon, and bond, were filed in

[1] The bills of exceptions are sometimes introduced after the final judgment. This practice is not objectionable, as the bills indicate the time they were tendered.

the said cause, and which remain on file in the office of the clerk of said court, in the words and figures following, to wit:

PETITION FOR WRIT OF ERROR.

To the Hon. *judge of*
of the state of Mississippi.

Your petitioner, A. G., respectfully represents, that by the judgment of the circuit court of , said county and state, rendered on the day of , 18 , in a proceeding by indictment found by the grand jury of said county, charging him with the crime of murder, he was sentenced to be hanged by the neck until he be dead, and that , the day of , 18 , was appointed for the execution of said sentence; and your petitioner avers, that in the record, proceedings, and judgment aforesaid, there is manifest error apparent in the record, by which he is injured, and by which he is aggrieved; wherefore your petitioner prays that the said record may be inspected, and that your honor will, if reasonable cause shall therein appear, grant to your petitioner a writ of error and *supersedeas*, returnable to the next term of the supreme court of the state, to the end that the said judgment and proceedings may be revised and said errors corrected; and as in duty bound, will ever pray, &c.

Signed, A. G., *Petitioner.*

The fiat of the judge, indorsed on said petition, is in the words and figures following, to wit:

To the clerk of the circuit court of county:

Let the writ of error and *supersedeas* issue, as prayed for by the petitioner, A. G., on his entering and filing his bond with , as his sureties, in the sum of payable to the state of Mississippi, and conditioned for the payment of all costs in case the judgment shall be affirmed.

Signed, *Judge.*

Filed this day of 18

A. E., *Clerk.*

And thereupon the said A. G. filed with the said clerk his bond, in the words and figures following:[1]

[1] Arts. 306-7-8, Code, 622-3.

THE STATE OF MISSISSIPPI. }
County. }

Know all men by these presents, that we, A. G. and his sureties, are held and firmly bound unto the state of Mississippi, in the sum of , for the payment of which well and truly to be made, we bind ourselves, our heirs, representatives, and assigns, firmly by these presents.

The condition of the above obligation is such, that whereas the said A. G. was by the judgment of the circuit court of county, and state of Mississippi, rendered on the day of 18 , in a proceeding by indictment of the grand jury of said county for the crime of murder, sentenced to be hanged by the neck until he be dead, and the said A. G., feeling himself aggrieved by said judgment, hath petitioned

(*Name of the judge granting the writ.*)

for a writ of error and *supersedeas*, returnable to the next term of the supreme court of the state, to the end that the same may be revised and reversed, and hath obtained the same on his entering into and filing this bond. Now, if the said A. G. shall prosecute his said writ with effect, and in case he shall fail therein, and said judgment shall be affirmed, shall well and truly pay all costs which have accrued, or which shall hereafter accrue, then this obligation to be void, otherwise to remain in full force and effect.

A. G. { SEAL. }

{ SEAL. }

{ SEAL. }

Filed this day of 18

A. E., *Clerk.*

The practice is for the clerk to issue the writ of error, indorsing thereon that "in obedience to the within writ I hereby transmit a full, true, and perfect transcript of the proceedings and judgment mentioned therein, as the same remains of record and on file in

office, as by said writ I am commanded," *and to transmit the original to the clerk of the supreme court with the transcript of the record, and it is filed with the record in the supreme court.*

The writ is in the form following:

THE STATE OF MISSISSIPPI, *County.* } To the clerk of the circuit court of said county, greeting:

Because manifest error hath intervened in the record, process, proceedings, and judgment in and before the said circuit court in a certain prosecution by the state of Mississippi against A. G. on a charge exhibited against him the said A. G. by the grand jury of said county for murder, wherein the said A. G. was convicted, to the great injury of him the said A. G., as by his complaint we are informed; and we being willing that error, if any there be, shall be corrected in due manner, and full and speedy justice done in the matter, do command you, if judgment be so given, to send, under the seal of your said court, openly and distinctly, a complete and perfect exemplification of all the said record, process, proceedings, and judgment, with this writ, so that the same be before our supreme court, to be held at , on , that on inspection thereof our said supreme court may cause to be done thereupon for the correction of that error, what of right and according to our laws ought to be done.

Witness the Hon. , chief justice of our said supreme court, the day of , 187 .

Witness also clerk of the circuit court aforesaid, and the seal of that court in the margin here of the , this last day being the day of the date and issuance of this writ. , *Clerk.*

The clerk also issues the writ of supersedeas, and delivers the same to the sheriff, who indorses thereon his acknowledgment of the receipt thereof, and this writ so indorsed is transmitted with the record to the clerk of the supreme court.

(*The writ of supersedeas is here given.*)

THE STATE OF MISSISSIPPI. To the sheriff of , county , said county, greeting: Whereas, on the day of , 18 , by the judgment of our circuit court of said county, in a certain proceeding by indictment found and presented by the grand jury of said county to said court, in the name and by

the authority of the state of Mississippi, A. G. was charged and convicted of the crime of murder, and was sentenced to be hanged until he be dead, and (*day of the week*), the day of 18 , was appointed for the execution of said sentence, and you were commanded to execute the same; and whereas the said A. G. hath obtained a writ of error returnable into the supreme court of the said state, on the Monday of , 187, and has executed and filed his bond for *supersedeas* of the execution of said judgment, according to law and the order of the judge granting the same, we therefore command you forthwith to supersede and desist from any further and all execution and action whatever upon said judgment, and to have then and there this precept before our said supreme court.

Witness the Hon. , chief justice of our said supreme court, the

Witness also A. E., clerk of our circuit court, and the seal of his court affixed.

{ SEAL. }

Issued this day of 187 .

A. E., *Clerk.*

The clerk's certificate, which is introduced at the close of the record proper, or after the petition for writ of error and bond, if the same be copied into the record, is as follows:

THE STATE OF MISSISSIPPI, }
County. }

I, A. E., clerk of the circuit court of the county aforesaid, do hereby certify that the foregoing pages contain a full, true, and perfect transcript of the record, process, proceedings, and judgment in the case therein mentioned and described, of the state of Mississippi against A. G., as fully as the same appears of record and on file in my office.

{ SEAL. }

Given under my hand and the seal of said court, the , this the day of 18 .

A. E., *Clerk.*

The forms in the preceding pages, as will be perceived, suppose a regular proceeding in a case of murder, in which the accused is either in custody or on bail. The caption of the minutes as given in the form, is subject to be varied by contingencies. In case of an interchange of

circuits or courts by the judges, and a judge not of the district presides, this fact is noted in the caption thus:

"The Hon. J. R., judge of the judicial district, presiding in lieu of and by exchange with the Hon. T. S., judge of this district."

In case the judge fails to attend during the first four days of the term, the minutes of the court will show the facts as follows:[1]

"Present , sheriff of said county, and , clerk of said court, and the judge of said court failing to attend, the said sheriff, after making proclamation that said court was duly opened, adjourned the same until to-morrow morning at o'clock."[2]

"In the circuit court of , county , morning of , 18 . Present as before; the said judge still failing to attend, the said sheriff did, by proclamation, open and adjourn said court until to-morrow morning at o'clock."

These entries are continued until the four days expire, unless the judge attends in the meanwhile, in which case the entry for the day notes his presence, and the entries proceed as in the form given.

If a sufficient number of qualified grand jurors fail to obey the summons, or if the board of supervisors has failed to select them, or any irregularity in respect to the selection and summoning shall have rendered the selection ineffectual, the caption of the minutes will be changed to meet the facts. In case no selection has been made by the board of supervisors, the entry will be framed thus:

"And it appearing to the court that the board of supervisors of the county of have failed to select persons as grand jurors for the present term[3] (or that the selection or summoning has not been made according to law, as the case may be), it is ordered by the court that the sheriff proceed forthwith to summon twenty good and lawful men of the county, being citizens of the United States, of the age of 21 and under 60 years, to be and appear before the court on , at o'clock, A. M., to serve as grand jurors for this term of the court."

If the summons be returnable on another day, the adjournment of the court and any other intervening orders may be made, and on the

1 Art. 6, Code, 479.
2 These entries are usually signed by the clerk and sheriff.
3 Art. 132, Code, 499.

return day of this summons the entry is made of the day and term of the court, and then follows the entry:

"The sheriff returned to the court that he had, in obedience to the order of the court, summoned the following named persons to serve as grand jurors at the present term:

(*Here insert the names of the persons summoned*)

and from the whole number of persons summoned, and attending, &c.," (as in the caption of the minutes in the form given.)

If the selection and summons be regular, and a sufficient number of qualified persons fail to attend, the entry will be made thus: "Of the number so selected, summoned, and attending, the court examined and elected the following persons as grand jurors, to wit:

(*Here give the names*)

which number being insufficient, it is ordered by the court that the sheriff forthwith summon persons, good and lawful men of the county, &c. (*proceed as in the form where the whole number is thus summoned*).

Where the accused is not in custody or on bail, no entry of the finding of the bill is made on the minutes, at the time of the return of the bill, but may be made at any time after his appearance.[1] *The court, where the party is not in custody or on bail, and is in the presence of the court, orders his arrest without process, otherwise the clerk issues a capias, which is under the seal of the court, and tested of the term.*[2]

The following is the form of the capias:

THE STATE OF MISSISSIPPI, *County.* } To the sheriff of said county, greeting:

"You are hereby commanded to take the body of , if to be found in your county, and him safely keep, so that you have him before the circuit court of said county (*if the writ is returnable to the court then in session, it is so stated, if to another term, state the term*), to answer the state of Mississippi on a charge of murder exhibited against him in said court by indictment found and presented by the grand jury of said county, and have then and there this writ."

As no entry in the minutes of the finding of the indictment is made unless the defendant is in custody, or on bail, or has appeared, when

[1] Art. 261, Code, 615. [2] Art. 284, Code, 619.

the defendant has not been taken, or is not on recognizance to appear, or has not appeared on the return of the bill of indictment into court by the grand jury, the clerk receives it, and indorses upon it the words: Presented in open court by the grand jury, and filed this the day of 18 *And signs the entry so made.*[1]

When the proper time arrives for making the entry in the minutes, the entry should be made in full, as in Entry No. 2, with such variation as the fact requires, thus:

THE STATE OF MISSISSIPPI, No. , *vs. Murder.* A. G. } In the circuit court, term, 18 , being the day of , 18 .

The grand jurors of the state of Mississippi, elected, empaneled, sworn, and charged to inquire in and for the body of the said county, came into open court, there being then and there present at least twelve of said jurors, on a former day of this term (or at the term of this court, 18), being the day of , 18 , and presented to the court on their oath, and by the hands of their foreman, a true bill of indictment against A. G. for murder, which bill of indictment was indorsed and signed by the said foreman as follows:

THE STATE OF MISSISSIPPI, No. , *Murder.* A. G. } ————, prosecutor. A true bill. (Signed) A. F., foreman of the grand jury.

And the said A. G. not having appeared, and not being in custody, or on recognizance to appear, the said bill of indictment was received by the clerk, and by him indorsed and signed as follows, to wit:

Filed this the day of , 18 .

A. E., *Clerk.*[2]

[1] Arts. 258 and 257, Code, 614.

[2] The 258th Art. of the Code, 614, was not designed to dispense with the entry showing that the indictment was found by the grand jury, but to delay such entry until the appearance of the party. The record should show in some part of it that the particular indictment was presented by the grand jury, and it must be identified as the indictment found. The statute seems to intend that the entry made after appearance shall take the place of that which was theretofore made on the day the indictment was returned into court, and the word "may" should not be construed to mean that it is optional with the clerk whether it shall be made at all. If we suppose the case of the return by the grand jury of a single bill of indictment, or of a number of indictments, against parties not under arrest or on bail, with nothing in the minutes to show that a grand jury ever came into court and presented the bills, as required by Article 257,

The final record continues from this entry with the words, "which bill of indictment so found and presented, with the indorsements, and signatures thereon, is in the words and figures following, to wit," *and the bill, with indorsements, is copied into the record.*

The entries in the minutes, and the final record, are varied by the course of the defense, the pleadings, and other steps taken in the cause.

The several modes of defense by motion to quash and by demurrer to the indictment—by plea in abatement and in bar (that to the jurisdiction is almost unknown in practice), and by motion in arrest of judgment, give rise to entries adapted to the particular action or judgment required. The particular defense made, except the last, is supposed to be made when the defendant is arraigned upon the indictment, or called before the court to be arraigned, though for defects of substance the defendant may be allowed to withdraw his plea, and move to quash or demur.[1] The demurrers, pleas, and replications are in writing, and like those in civil cases, are filed, and become part of the final record, but are not set out in the *minutes*. The practice in this state is to enter the motion to quash on the motion docket, and to file demurrers and pleas. The prosecution is regarded as joining in the demurrer, without any special entry to that effect. If the plea be demurred to, the demurrer is in writing filed, and if replied to, the replication is also filed.

The entries in the minutes of the disposition of these defenses are as follows: on the motion to quash, after stating the cause, with its number, and the day and term of the court, and the appearance of the district attorney and the defendant in person, which is made in every entry after the defendant has appeared, the entry proceeds thus, "and thereupon (*the indictment being read to him*) the defendant moved the court to quash the indictment against him for certain causes alleged, and appearing on the face of said indictment, and set forth in his motion, which motion

there would be wanting the evidence of the most material part of the prosecution, to wit, the authority to try the party. One of two courses, therefore, should be pursued. Either there must be an entry such as that indicated in the above form, or an entry of the return into court as required in Art. 257, concluding with these words: "and by the hands of their foreman returned certain bills of indictment, which are indorsed by their foreman," &c., and filed and signed "true bills" by the clerk, and numbered 1, 2, 3, 4, &c.

1 Code, Art. 268, p. 616.

being heard and argued: It is considered by the court that said motion be and the same is hereby sustained, and the said indictment quashed."[1] If the district attorney suggests that there are sufficient grounds for an indictment against the defendant, and that he will present the case to the grand jury for a new bill, as is ordinarily done, then the entry concludes, "and on motion of the district-attorney, it is ordered that the defendant remain in custody until the grand jury shall consider of another indictment against him;" otherwise it concludes, "and that the defendant go without day." If the motion be overruled, the word "overruled" is used in place of "sustained" in the above form.

In the case of a demurrer to the indictment, after the statement of the case, day and term of the court, and the appearance, the entry proceeds, "and the demurrer of the defendant to the bill of indictment against him in this case, coming on to be heard, and after argument by the counsel for the state and the defendant, it is considered by the court," &c., the entry concludes substantially as that on sustaining the motion to quash, and is governed by the same considerations as to the discharge of the prisoner.[2]

In case the demurrer is overruled, however, the judgment is, in cases of felony, that "the defendant have leave to withdraw the demurrer, and plead over to the charge in the indictment," (or that he "have leave to answer over.") And it may be said generally that on all demurrers, whether to the indictment, plea, or replication, where the judgment is against the defendant, the judgment is to answer over in effect; for even in misdemeanors, where he demurs to the indictment, as well as in felonies, the practice in this state is to allow the defendant to withdraw the demurrer and plead over. It is nevertheless true that on the overruling of a

[1] Quashed means vacated or annulled.

[2] The formal judgment on demurrer sustained is "discharged of the premises in the indictment specified," and this is preceded by a statement of the cause of the judgment, "and because it appears to the court that said indictment is insufficient in law to require the defendant to answer the same," &c., &c.

This is unnecessary. The demurrer states the objection to the indictment, and the word "sustained" implies that the objection exists. The forms given are intentionally abridged as matter of economy, but nothing essential is omitted. The motion, demurrer, and plea, if framed by competent lawyers, indicate the judgment asked for; and the rule requiring a prayer of judgment ought to be adhered to for the benefit of the unlearned.

When the judgment is for the defendant on demurrer to a plea in bar, or on verdict on issue taken on the plea, it is an acquittal, and the judgment is "discharged of the premises in the indictment specified, and go hence without day."

demurrer to the indictment in misdemeanors, pleading over is not a matter of right.[1]

When a demurrer is sustained to the replication to a plea, or overruled when filed to a plea, the judgment, if the plea is in abatement, is, "that the prosecution (or the indictment) abate." If the plea is in bar, the judgment is that the "defendant be discharged of the premises in the indictment specified, and go without day." If an issue of fact be joined on a plea in abatement, and it be found for the defendant, the judgment is that the "prosecution on the indictment abate." Should the issue be found for the state, the judgment in cases of felony is "that the defendant answer over to the charge in the indictment." In misdemeanors the judgment is final, for the state and sentence follows for the offense. In capital cases, when an issue of fact is presented otherwise than by the plea of not guilty, the trial is by the ordinary jury for the trial of issues. The special *venire* is only awarded in capital cases, where the plea of not guilty is interposed. The entry in such issues is as follows. After the statement of the day and term, and the appearance of the parties as in other entries, the entry proceeds: "And issue being joined, on the defendant's plea (*describing it*), it is ordered that a jury come, whereupon came the following jury of good and lawful men, who being elected, empaneled, and sworn, to try the issue joined, and having heard the evidence, retired to consider of their verdict, and returned the following: We, the jury, find the issue joined for the state (or 'for the defendant,' as the case may be)." From what has been already said as to the proper judgment on the verdict, the clerk will be at no loss in entering it. The motion in arrest of judgment is made after the verdict, and if sustained, the judgment is, "It is considered by the court that the judgment be and the same is hereby arrested, and that the indictment and all the proceedings therein be vacated and set aside, and that the defendant be discharged, and go without day." It may be observed that the judgment on the motion in arrest of judgment on demurrer to the indictment, or motion to quash founded on the invalidity of the indictment or proceedings,

[1] Archbold Plead. and Practice, 7th edition, Waterman's Notes 1 and 2, p. 381; 1 Bishop's Criminal Procedure, §§ 441, 462, 464; 1 Wharton's Am. Crim. Law, 528. Demurrer to defendant's plea overruled judgment final for him. Rawle v. State, 8 S. & M., 529; Minzza v. State, 36 Miss., 613; M'Guire v. State, 366.

[2] Pleas in abatement are not very frequent. The statute allowed the indictment to be amended, and otherwise circumscribed their scope. They are rarely resorted to except for defects in the organization of the grand jury. Code, 616, Art. 267.

constitute no bar to a subsequent indictment, and consequently the entries only discharge the defendant, when there is no suggestion to the court to detain him to answer another indictment.

The entry of continuances, states on whose application it is granted, and, like all other entries, states the day, term, and the presence of the parties. A change of venue in capital cases is of frequent occurrence. It is made after appearance and arraignment, and plea of not guilty. The entry, after the usual preliminary statement of day and term, and presence of the parties, proceeds, "And the said defendant moves the court to change the venue in this cause, and the court being satisfied from the oath of the defendant and the testimony of credible witnesses, that the defendant, by reason of prejudice in the public mind, cannot have a fair and impartial trial in this county,[2] it is considered that the venue in this case be and the same is hereby changed to the adjoining county of . The statute, Code, page 621, prescribes the duty of the clerk, and therefore the entry need not contain any order directing the clerk to make the transcript of pleadings, entries, &c., &c., and to transmit the same. The directions are so explicit that no mistake is likely to be made. In the court to which the case shall be sent, the clerk, on receiving the transcript containing the order changing the venue, enters the case on the state docket.

The first entry is usually the order for the special *venire*. It is proper to recite in the entry, after stating the appearance, &c., "And the order of the circuit court of county, changing the venue in this cause to this county, being now read and heard, and it appearing that the transcript of the proceedings, entries, pleadings, orders, &c., &c., have been made out and filed in this court, according to the statute in such case made and provided, on motion of the district attorney, it is ordered, &c.," and then

1 The motion in arrest of judgment has been by statute greatly curtailed. Code, 573, Art. 7. From the article cited, it would seem that the omission to move to quash, or to demur, would preclude every objection of form and substance after verdict, but there can be no waiver of the indictment found by a grand jury, nor of the right to insist that the indictment shall charge an offense known to the law. See Art. 359, Code, 630.

If the record does not show jurisdiction of the offense or the person, or that the provision of the constitution as to the grand jury have been respected, or that an offense has been charged, a motion in arrest of judgment after verdict would prevail, or the judgment reversed on writ of error. The courts will not lend their sanction to implied waiver of rights in criminal cases, so that the omission of any of the essential things necessary to confer on the court the *power* to punish may be taken advantage of after verdict and before judgment by motion in arrest.

2 Art. 298, 299, Code, 621.

follows the order for the special *venire*, as in Entry No. 3. In the final record, the several entries in the minutes which have just been described are preceded by the usual recital, "And afterwards, to wit, on the day of , 18 , at the term aforesaid, in the court aforesaid," "and the said defendant being arraigned and charged in the indictment, moved the court to quash the indictment," giving the entry in the minutes, or "filed his demurrer to the indictment against him, which demurrer is in the words and figures following, to wit (*here insert the demurrer*), and afterwards, to wit, on the day of , 18 , at the term aforesaid, of the court aforesaid, came the district attorney, &c., &c., giving the entry in the minutes of the disposition of the demurrer. In case of a plea the entry is, "and filed his plea to said indictment, which plea is in the words and figures following (*here insert the plea*): And thereupon the district attorney, on the part of the state, filed his replication (or demurrer, as the case may be) to said plea, which replication is in the words and figures following, to wit," inserting the replication or demurrer.

These examples will, it is thought, enable the clerk to make his entries and to draw up the final record in any given case. The caption of the minutes is part of every record in a criminal case in which the indictment is found at that term. The Entry No. 3 differs in cases of felony not capital, and misdemeanors, as there is no order in such cases for a special *venire*. In felonies, the jurors of the regular *venire* serve on the trial, the jury is sworn specially, and the statement in the minutes is, after the recital of the arraignment and plea, "and thereupon it is ordered that a jury come, whereupon came the following jury, of good and lawful men, to wit," &c.

A prosecution sometimes terminates by the act of the district attorney. He is, under certain circumstances, permitted to move to quash the indictment, and more frequently to enter a *nolle prosequi*.

The entry of the *nolle prosequi* is allowed by the court in its discretion, but not after the party has been arraigned and the jury sworn on a valid indictment, for this is equivalent to an acquittal. The entry, after the usual preliminary recital, is: "And thereupon the district attorney on the part of the state, by leave of the court for that purpose first had and obtained, says he is unwilling further to prosecute the defendant on the indictment in this case; it is

therefore considered that the said indictment be retracted, and the defendant discharged without further answer," &c.

MISTRIAL.

It frequently happens that after the case has been submitted to the jury, no verdict is rendered for some cause; generally because of a failure of the jury to agree. It is important that the exact cause be given in the minutes and final record, because the defendant is considered as in jeopardy, when the case has, on the plea of not guilty, been submitted to the jury on the evidence and argument of counsel, and instructions of the court. The defendant's consent to the discharge of the jury must be given and appear of record, or the cause of discharge must be such as justifies the court in ordering it without his consent; as where a juror dies or becomes disabled to serve, or where the court expires or is about to expire, by the expiration of the legal term. Otherwise the discharge will be tantamount to an acquittal.[1]

In cases of consent by the defendant, the entry proceeds as in Entry No. 3, to the point where the jury retires to consider of their verdict, and then it concludes as follows: "And afterwards, to wit, on the day of , 18 , being the day of the term aforesaid, the said jury came into court, as also the district attorney and the defendant in person, and the jurors say that they find themselves unable to agree to any verdict, and thereupon the district attorney, on the part of the state, and the said defendant in person, say, that they are willing that said jury may be discharged from rendering a verdict in this case. It is therefore ordered by the court that the said jury be discharged from rendering a verdict in this cause, and that the same be continued to the next term of this court."

Recognizance to appear, taken in open court.

After stating the case and term, the appearance of parties, &c., the entry of the recognizance proceeds: "And the defendant moved the court to discharge him from custody on his recog-

[1] Josephine v. The State, 40 Miss., 614. There is some diversity of opinion on the question whether a court can, without the assent of the accused, discharge the jury, when after an earnest effort they find it impossible to agree. The supreme court of the United States, in the case of Perez, 9 Wheaton, asserted the power to discharge in such case without the prisoner's consent.

nizance to appear, and tendered as sureties for his appearance, and the said sureties being approved by the court, thereupon the said defendant and his said sureties, in open court acknowledge themselves to be indebted to the state of Mississippi in the sum of dollars, that is to say, the said defendant in the sum of dollars, and the said jointly and severally in the sum of , to be levied of their goods and chattels, lands and tenements, respectively: Provided, that default be made in the following condition, which condition is that the said shall be and personally appear at the circuit court, to be holden in and for the county of , at the court-house thereof, on the of , 18 , to answer the state of Mississippi on charge of , whereof he stands indicted by the grand jury, and there remain from day to day, and from term to term, until he shall be discharged by due course of law."

JUDGMENT NISI ON DEFAULT MADE.

After the usual statement of case and term, and the appearance of the district attorney, the entry proceeds: "And the said defendant , being solemnly called, came not, but made default, and , his said sureties, being solemnly called to appear and bring with them the body of the said defendant , came not, but also made default. It is therefore considered by the court that the state of Mississippi recover of the said defendant , the sum of dollars, and of , his sureties, the sum of dollars, to be levied of their goods and chattels, lands, and tenements respectively, together with the costs, &c., unless they shall be and appear before this court at the next term thereof, to show cause, if any they can, why this judgment shall not be made final against them; and it is further ordered that the writ of *scire facias* issue , to make known to them the order of this court in the premises:

SCIRE FACIAS.

THE STATE OF MISSISSIPPI, } To the sheriff of said county,
County. } greeting:

You are hereby commanded to make known to and that on the day of , 18 , in the

circuit court of the said county, the state of Mississippi recovered judgment against the said for the sum of , and against , his sureties, for the sum of , in a certain recognizance before that time entered into before the court aforesaid, for the appearance of the to answer the state of Mississippi on a charge of , of which the said stands indicted as by the record thereof in said court appears, which said judgment was rendered by reason of the default of said in making his appearance, as by said recognizance he was bound to do: and that unless they the said , and the said shall appear, and show cause why the said judgment ought not to be rendered, the same will be made final against them, and have then there this writ.

(*Tested and sealed as other writs.*)

Judgment made final on return of *sci. fa.*, *casa* stated, day and term, and appearance of the district attorney, and default of the defendant, the entry then proceeds: "And because the said defendants have failed to appear, and show cause against the rendition of the judgment of this court, rendered on the day of , 18 , against the said , for the sum of dollars, and the said for the sum of dollars, it is considered by the court that said judgment be and the same is hereby made final as of the date aforesaid, and that execution issue."

INDEX.

ABATEMENT.

See *Grand Jury*, *Indictment.*

1. A prisoner has the right to question by plea in abatement, the competency of the grand jury by whom he was indicted; he cannot be called to answer a charge unless it has been preferred according to law.—*McQuillen* v. *State*, 858.
2. Pleas in abatement must be made at the proper time; by denying the charge the accused waives matter in abatement.—*Ib.*
3. A plea in abatement that the indictment was found by men who were not a part of the original panel, is good, and should be received; and on the trial of the plea it is competent for the defendant to read in evidence the original *venire*, for it is conclusive proof on the point.—*Rawls* v. *State*, 868.
4. Incompetency of the grand jury may be pleaded in abatement, and if true it will defeat the indictment.—*Ib.*
5. There is no law which authorizes the court to take substitutes for any portion of the regular panel. If it can for one, it can for the whole. And if the court do receive substitutes, the indictment found by them will be quashed by plea in abatement.—*Ib.*
6. When a plea in abatement to an indictment is demurred to, and the demurrer overruled, the judgment of the court should be that the indictment be abated.—*Ib.*
7. An accused has the right to challenge, by plea in abatement, the competency of the grand jury by whom the indictment against him is preferred.—*Barney* v. *State*, 426.
8. After a party has pleaded in bar to an indictment, and been convicted, it is too late to urge objections to the constitution of the grand jury. Such objections must be pleaded in abatement, or they will be considered as waived.—*Leathers* v. *State*, 679; *Green* v. *State*, 788.
9. Where the issue on a plea in abatement is an immaterial one, and the plea is quashed by demurrer, the defendant should be allowed to plead over.—*Smith* v. *State*, 802.
10. In misdemeanors, where the issue on a plea in abatement is decided against the accused, he will not be allowed to plead over, but it is otherwise in cases of felony.—*Sumrall* v. *State*, 803.
11. The affirmative of an issue upon defendant's plea in abatement denying the competency of one of the grand jury is on the state; and on the trial of such an issue one of the grand jury is incompetent to sit as a petit juror.—*Beason* v. *State*, 1075.
12. In misdemeanors, a plea in abatement being found against the defendant, the judgment should be final, and not *respondeat ouster*.—*Miazza* v. *State*, 1205.
13. It is not a valid plea in abatement to an indictment for murder, to allege that the grand jury who found it were an illegal body because they were selected by an illegal board of supervisors; the acts of a board who are only *de facto* such being as valid as to third persons as those of a board *de jure*.—*Durrah* v. *State*, 1668.
14. The empaneling of a grand jury is made by statute conclusive evidence of its qualifications and competency; and after it has been organized and sworn, no exceptions can be taken to its legality as a whole, or to the qualifications of its constituent members. And it is not error to refuse the defendant leave to withdraw his plea of not guilty, and to plead in abatement to the indictment, unless he presents matter in abatement, true in point of fact and valid in law.—*Ib.*

ACCESSORY.

See *Principal and Accessory, Homicide.*

1. The record of the court showing the conviction of the principal of murder may be properly admitted on the trial of the accessory, as evidence of the guilt of the principal.—*Byrd* v. *State*, 45.

2. If S. has already formed the murderous design, and K. encourage him to carry it out, by stating falsehood, or otherwise, K. is guilty as accessory.—*Keithler* v. *State*, 403.

3. The testimony of an accomplice should be received with great caution by the jury, but it is impossible to say that he should not be believed. The jury are to determine his credibility from his manner and other surrounding circumstances.—*Ib.*

4. A voluntary confession of an accomplice is entitled to little weight; and if a different statement afterwards, under oath, when circumstances have changed his condition, it will be for the jury to say whether they will disbelieve him on account of such discrepancy.—*Ib.*

5. When an accomplice, under sentence of death, without hope of pardon, it will be supposed that all motive to falsehood had ceased to exist.—*Ib.*

6. The record of the conviction of the principal is evidence against the accessory. It is competent to prove the conviction of the principal and all its legal consequences; but not evidence of the fact of the guilt of the accessory.—*Ib.*

ACCOMPLICE.

See *Accessory, Principal and Accessory.*

1. A party may be convicted of a crime upon the testimony of his accomplice. His connection with the crime goes to his credibility, but does not affect his competency, and the jury are the exclusive judges as to the degree of weight that his testimony is entitled to.—*Dick* v. *State*, 611.

ADULTERY AND FORNICATION.

1. The general rule is that hearsay evidence is not admissible. The exceptions to this rule are grounded alone upon necessity. The offense of fornication, charged in the indictment, is one of a specific character, not falling within those exceptions, and must be proved in the mode pointed out by law.—*Overstreet* v. *State*, 112.

2. Criminal intercourse, once shown, is presumed, if the parties are still living under the same roof, to continue, notwithstanding those who dwell with them are not prepared to depose to the fact. The principle is specially applicable to a civil proceeding for a divorce.—*Carotti et al.* v. *State*, 1562.

3. In order to constitute the offense of adultery or fornication, under Art. 3, p. 572, of the Rev. Code, it must be shown that the parties dwell together openly and notoriously, as if the conjugal relation existed between them.—*Ib.*

4. C. and W. were indicted for unlawful cohabitation. The testimony showed that they lived together under the same roof as master and servant, and that there were occasional instances of illicit intercourse between them. *Held*, That under the statute the testimony was not sufficient to warrant a conviction.—*Ib.*

5. Adultery and fornication are not indictable at common law unless committed openly and publicly, as in a street or highway.—*Ib.*

AGENT.

1. No one can excuse himself from the operation of penal statutes, on the mere ground that he acted only as agent for another person.—*Kligfield* v. *State*, 150.

AMENDMENT.

1. If an indictment is defective because the name of the prosecutor is not marked on, it

is too late to remedy it by amendment after trial. The law of amendments does not apply to criminal cases.—*Moore* v. *State*, 464.

2. The court has no power to amend an indictment as to matter of substance without the concurrence of the grand jury by whom it was found, though amendments as to mere informalities may be made by the court.—*McGuire* v. *State*, 1097.

3. Under the statute, Rev. Code, 615, Art. 262, the indictment may be amended by striking out certain descriptive words from it.—*Rocco* v. *State*, 1280.

4. The right and power to amend an indictment for a felony in a material matter, after the expiration of the term of court at which it is found, and without the consent of the accused, is questionable.—*Unger* v. *State*, 1584.

APPEAL.

See *Writ of Error*.

1. In criminal cases, an appeal does not lie to the High Court of Errors and Appeals. Such cases can only be removed by writ of error.—*Tourney* v. *State*, 180; *Loftin* v. *State*, 420.

2. The judgment of the circuit court upon an appeal from the decision of a justice of the peace and five slaveholders, convicting a slave of an offense not capital, is final, and not revisable in the High Court of Errors and Appeals.—*Minor* v. *State*, 1220.

3. The remedy of "appeal" in the county court law is given from that court directly to the circuit court, and limited to that court; therefore no appeal or writ of error lies from a judgment of the county court to the High Court of Errors and Appeals.—*Dawkins* v. *State*, 1574.

ARRAIGNMENT.

See *Practice*.

1. Where a former judgment of the circuit court has been reversed for errors occurring during the trial, and not affecting the plea, and the cause remanded, it is not necessary to arraign the prisoner again on his second trial, inasmuch as the former plea still remained.—*Byrd* v. *State*, 73.

2. In criminal cases the defendant cannot waive an arraignment, and he must plead in person to the indictment; he cannot plead by attorney; and where it is shown that the "defendant appeared by attorney and pleaded not guilty," the judgment will be arrested and the verdict set aside.—*Wilson* v. *State*, 1561.

ARREST OF JUDGMENT.

See *Grand Jury*, *Indictment*, *Record*.

1. A motion in arrest of judgment is confined to defects upon the face of the record itself, and which make the proceedings apparently erroneous; and no defect in evidence, or improper conduct on the trial, can be urged under this motion.—*Covey* v. *State*, 349.

2. Irregularity in the jury is not proper ground for a motion in arrest of judgment.—*McCann* v. *State*, 899.

3. Where a motion in arrest of judgment is overruled in the court below, and sustained in the appellate court, on the grounds of a defective indictment, the prisoner must be remanded for a new indictment.—*Jones* v. *State*, 416.

4. A motion in arrest must be made on the grounds of defects appearing on the face of the record; the fact that the offense was committed twelve months before the finding of the indictment is no ground for such motion.—*Heward* v. *State*, 465.

5. It is an irregularity to charge distinct felonies in different counts of the same indictment. But this does not constitute a ground for a motion in arrest of judgment.—*Wash* v. *State*, 517.

6. Objection to an illegal grand jury may be made by motion in arrest of judgment.—*Miller* v. *State*, 1042.

7. Other indictments of like import pending against the same party, will not be allowed to sustain a motion in arrest of judgment. He must plead to those indictments, and may set up his former conviction or acquittal.—*Mizzo* v. *State*, 1205.
8. Motions in arrest must be made on the ground of some defect appearing on the face of the record. Hence the fact that one of the jury was not a householder or a freeholder, or was otherwise incompetent, is no ground for a motion in arrest of judgment.—*Frank* v. *State*, 1474.

ARSON.

The *corpus delicti* in a case of arson is the burning of the house; and if that fact be established by evidence *aliunde*, the confessions of the accused are admissible to show that the burning was done feloniously, and that he was the criminal agent.—*Sam* v. *State*, 1037.

ASSESSOR OF TAXES.

1. The duties imposed by law upon the assessor of taxes in this state cannot be performed by an agent; and there is no statute which authorizes the assessor to act by deputy.—*Stokes & Johnson* v. *State*, 634.
2. A list of the persons liable to jury service, returned by a person acting as deputy assessor of taxes, is invalid, and a valid grand jury cannot be drawn from it.—*Ib.*

ASSAULT WITH FELONIOUS INTENT.

1. Where the indictment charges a shooting with a felonious intent, it must be proved on the trial that the gun was so loaded as to be capable of doing the mischief alleged to be intended.—*Vaughan* v. *State*, 245.
2. An indictment that charges an "assault and battery with a deadly weapon upon a certain slave, 'with intent to commit manslaughter,'" can only be construed to charge an aggravated assault.—*Bradley* v. *State*, 416.
3. Evidence of a single witness, that the defendant was seen with a knife in his hand, in pursuit of a slave, when he was stopped by the witness, and that he made threats against the life of the slave, is insufficient to warrant a conviction for an assault with intent to kill.—*Ib.*
4. An indictment for assault with intent to kill, without alleging an assault upon a particular person with an intent to kill that person, is defective, and may be taken advantage of by motion in arrest of judgment.—*Jones* v. *State*, 418.
5. It is a universal principle of evidence, that a man shall be understood to intend that which he does, or which are the natural consequences of his acts.—*Morgan* v. *State*, 452.
6. Where a general felonious intention is sufficient to constitute the offense, it is no ground of excuse where a party who intended to commit one felony has committed another.—*Ib.*
7. The specific intention of killing the particular person alleged to have been shot at, is an essential ingredient of the offense charged in the indictment, and proof of a general felonious or malicious intention is not sufficient. It is incumbent on the state to prove the specific intent charged.—*Ib.*
8. An indictment, charging in one count an assault with intent to kill, and a second count charges an assault and battery, is good, and the jury may acquit the accused as to the first count, and find him guilty as to the second.—*Brantley* v. *State*, 484.
9. No fact which enters into the essence of the offense, save that of criminal intention, can properly be denominated an assault with intent to commit a crime. It is a separate, distinct offense, created and defined by statute.—*Laura* v. *State*, 700.
10. The unlawful use of a deadly weapon by a slave, in an assault and battery on his master, employer, etc., is not of itself the same as, or conclusive evidence of, the intent to kill which constitutes the gist of the offense under Rev. Code, 248, art. 59, but it is

prima facie evidence of such intent, which will prevail, unless rebutted by the other proof in the cause.—*Jeff* v. *State*, 1258.

11. An indictment for an assault and battery with intent to kill and murder, must state that the offense was committed with a deadly weapon, or other means or force likely to produce death.—*Williams* v. *State*, 1557.

ASSAULT AND BATTERY.

1. A prosecutor in an indictment for an assault and battery, with intent to murder, who has commenced a civil suit for the injury, will not be compelled to elect or abandon the civil suit, or the prosecution; but both may be sustained, the first for damages to the injured individual, the second to avenge the public wrong.—*State* v. *Blennerhassett*, 1.

2. A prosecutor in an indictment is a competent witness for the state upon the trial, though liable for costs if the prosecution be frivolous or malicious.—*Ib.*

3. Defendants separately indicted for the same assault and battery, may be tried jointly, although they may have claimed the right to be tried separately.—*Ib.*

4. Where two defendants are tried together on indictments for the same assault and battery, one of the defendants is not a good witness for the other upon the trial, unless no proof of guilt is offered against the person proposed as a witness.—*Ib.*

5. The voluntary withdrawal, during the trial, of a witness subpœnaed, but not examined on behalf of the state, is not sufficient ground to grant a new trial, especially where his testimony is not shown to be material for the defendant.—*Ib.*

6. Where the jury assess a fine, the court will not grant a new trial, unless the amount of the fine is so excessive as to evince partiality or corruption in the jury.—*Ib.*

7. Express malice is not an essential ingredient in the offence of assault and battery upon a white person by a slave with intent to kill. Hence it is unnecessary to allege it in the indictment or prove it on the trial.—*Ike* v. *State*, 578.

8. Although, at common law, a husband has the right to chastise his wife, he may still be convicted of an assault and battery upon her.—*Bradley* v. *State*, 20.

9. Where the indictment charged that the prisoner, "with force and arms in the county aforesaid, in and upon the left arm of him, the said Alson Shelby, then and there feloniously and maliciously did, with a certain drawn knife, stab and wound, with intent, then and there, feloniously, wilfully, and of his malice aforethought, the said Alson Shelby, to kill and murder," the indictment was held bad, because it did not allege that the prisoner "did *assault and beat*, and because it did not charge that the instrument was a *deadly weapon*."—*Ainsworth* v. *State*, 183.

10. An assault is any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness. The offer or attempt must be intentional. If it can be collected that there was not a present purpose to do an injury, it is not an assault.—*Smith* v. *State*, 1369.

11. A mere purpose to commit violence, however plainly declared, if not attended by an effort to carry it into immediate execution, falls short of an actual assault. HANDY, J., *dissented*.—*Ib.*

12. When an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose—the battery is attempted.—*Ib.*

BAIL.

See *Homicide, Recognizance.*

1. It is competent for the circuit court, in all offenses, except those of a capital nature, to take bail after conviction, to secure the appearance of the prisoner, to receive and abide the sentence of the law. The power to take bail in certain cases after conviction existed at common law.—*Davis* v. *State*, 205.

2. Where the sheriff executes a bench warrant, and takes bail, he should so state it, and return the facts in full to the court.—*Overaker* v. *State*, 268.

5. By the constitution of this state, all prisoners, before conviction, are bailable by sufficient securities, except for capital offences, where the proof is evident or presumption great.—*Dyson, ex parte*, 641.

4. The circuit courts of this state now possess and may exercise the power of bailing after conviction in all cases not capital, whenever a sound discretion will warrant it.—*Semble:* In cases of misdemeanor, whenever the party obtains a writ of error and *supersedeas*, this discretion ought always to be exercised in favor of bail.—*Ib.*

5. In cases of bail each case must depend upon its individual merit. And, after a full inspection of the case, if the court does not find the existence of those special circumstances which ought to exist, bail will be refused.—*Ib.*

6. All prisoners shall, before conviction, be bailable by sufficient securities, except for capital offenses, where the proof is evident or presumption great.—*Wray, ex parte*, 875.

7. Bail, in capital cases, is a matter resting in the sound legal discretion of the court; but if the offense is not shown by proof evident, or great presumption, to be such as deserves capital punishment, bail is not a matter of discretion in the court, but of right in the prisoner.—*Ib.*

8. A party in custody of the sheriff under indictment for felony, and in whose case a mis-trial has been had, and the jury disagreed, must be considered as remaining in custody till legally discharged; and the sheriff has authority, under the act of 1822 (Hutch. C., p. 444, § 13; Rev. C. 1857, p. 127, art. 129), by virtue of an order of the court, to take bail or recognizance at any time before such legal discharge.—*State* v. *Brown*, 926.

9. A prisoner has a right to a writ of error to revise a judgment on *habeas corpus* refusing him bail.—*Moore* v. *State*, 1163.

10. In determining in this court that a prisoner shall or shall not have bail, the court does not mean to prejudice his case so as to influence a jury who may afterwards try the issue of his guilt. He may be refused bail, and afterwards acquitted; or granted bail, and afterwards convicted of murder.—*Ib.*

11. A jury may, and perhaps ought, in some cases, to find the defendant guilty of murder, even after this court has allowed him bail.—*Ib.*

12. Under the liberal principles of our constitution and laws, in cases of homicide, bail should be granted, even in cases where the jury might, and perhaps ought, on the same evidence, to render a verdict of guilty of murder. Moore v. State, 36 Miss. 137, cited and reaffirmed.—*Beall* v. *State*, 1483.

13. At common law, the court of king's bench and its judges had the *power* to bail in all felonies, before or after conviction, without regard to the nature of the crime or punishment. But the practice was not to bail where the facts made it highly probable that the accused had committed a felony.—*Street* v. *State*, 1591.

14. The discretionary power to bail, at common law, was rarely exerted after indictment for a felony, except in special circumstances, arising generally after indictment.—*Ib.*

15. The bill of rights makes bail a matter of *right* for all crimes except capital felonies, where the presumption is great or proof evident. The original of this provision is a clause in the ordinance of 1789, for the government of the territory north of the Ohio river. From this original it has been copied into most of the state constitutions and statutes.—*Ib.*

16. The courts of many of the states hold the indictment for murder as furnishing the "presumption great," and decline to hear testimony to reduce the grade of the crime from murder to manslaughter.—*Ib.*

17. In this state for many years the practice varied. But since the decision in the case of the State v. Wray, the practice has been to receive testimony *aliunde* the indictment.—*Ib.*

18. On a writ of error in *habeas corpus* proceedings, the supreme court exercises purely a revisory and correctionary jurisdiction. The judgment reviewed is presumptively correct, and error must be shown. The supreme court have no larger discretionary power to bail than the court of original jurisdiction.—*Ib.*

19. If the testimony be conflicting, or the credibility of witnesses involved, the appellate court would regard the circuit judge who heard it orally as in the most favorable condition to come to a correct conclusion, and would not disturb his decision.—*Ib.*

20. If the testimony make the impression on the mind of the supreme court that the petit jury would be warranted in a verdict of guilty, the judgment of the circuit judge denying bail would be affirmed.—*Ib.*

21. If the return to this writ is that the relator is in custody, to answer an indictment for murder, lawful authority for the detention is shown; and if no testimony were offered to show a lesser grade of felonious homicide, or that the accused ought not to be convicted of any offense, it would be the duty of the judge to remand.—*Ib.*

22. A defendant to indictment being at large on bail, may, at any time, be surrendered by his bail to the sheriff of the county in which the indictment is pending; and the sheriff may again admit him to bail or recognizance with new sureties.—*Kellogg* v. *State*, 1619.

23. The conditions of a recognizance being that a defendant shall appear before the circuit court of the county, on the 4th Monday in May, that being the time fixed by law for the commencing of the court, and no year being specified, held sufficient to fix the liability of the surety in case of default at the next term of the court.—*Ib.*

BIGAMY.

1. Where a man marries a woman whose husband by a former marriage has been absent and unheard of for five years previous to such second marriage, the law presumes that such first husband is dead, and that the second marriage is valid.—*Gibson* v. *State*, 1351.

2. The legal presumption of the death of a husband or wife who has been absent without being heard from for five years, and the consequent validity of a second marriage contracted by the abandoned party, after the expiration of that period, will be acted on in a prosecution for bigamy against one of the parties to such second marriage who subsequently, and during the life of the other, has contracted another marriage.—*Ib.*

BILL OF EXCEPTIONS.

1. A party, in order to present the question of error in the decision of the court upon the competency and relevancy of evidence, offered on the trial of a cause, or of any matter of fact brought to the consideration of the court, not appearing by the pleadings, should except to the opinion and embody the evidence or facts in the bill of exceptions. If this be not done, the judgment of the court below upon the subject, will be regarded as correct.—*Woodsides* v. *State*, 95.

2. The bill of exceptions should set forth the precise grounds of exception, otherwise the court cannot take cognizance of the subject-matter.—*Friar* v. *State*, 114.

3. When reference is made in the bill of exceptions to a paper by a particular mark, as being part of the bill of exceptions, this reference must clearly appear, or the court will not presume the paper in the record to be the same referred to in the bill. The evidence, if to be reviewed by the appellate court, must be certified by the court below, in a bill of exceptions.—*Oliver* v. *State*, 167.

4. When the bill of exceptions purports to contain all the evidence adduced on the trial, and is so certified by the judge of the court below, this court will presume it to be true. —*Vaughan* v. *State*, 245.

5. In criminal as well as civil cases, the rule is that the party who complains of the judgment must make the error apparent; and if it is some part of the proceedings not appearing on the face of the record, it must be placed there by the bill of exceptions.—*McQuillen* v. *State*, 358.

6. When the judge of the circuit court refuses to sign a bill of exceptions, it may be signed by two of the attorneys of said court, and be in compliance with the statute.—*Rowle* v. *State*, 368.

7. The high court of errors and appeals cannot notice the instructions given or refused

in the court below, unless they are embodied in a bill of exceptions.—*Stoughton* v. *State*, 460.

8. The statute which requires the clerk to put down the charges given or refused, and make them a part of the record, does not apply to criminal cases, except they are embodied in the bill of exceptions.—*Cain* v. *State*, 481.

9. In criminal prosecutions no alleged error in the instructions to the jury will be noticed, unless they are embodied in the bill of exceptions, and thus made a part of the record.—*Wash* v. *State*, 517.

10. The signing and sealing of bills of exception is clearly a ministerial and not a judicial act, and the statute, (Hutch. Code, 890,) providing that bills of exception may, under certain circumstances, be signed by the attorneys of the court, is constitutional.—*Van Buren* v. *State*, 604.

11. This court will not review the action of a circuit court, overruling a motion for a new trial, or giving instructions alleged to be erroneous, or any other matter assigned for error, unless the same shall have been properly excepted to in the court below.—*Scott* v. *State*, 886.

12. A bill of exceptions to the judgment overruling a motion for a new trial, brings before the appellate court, for review, the motion and the reasons by which it was sustained, the evidence, and the judgment. The exception in such cases may contain a transcript of the instructions, but do not properly bring them up for revisal.—*Haynie* v. *State*, 943.

BURGLARY.

1. To constitute the crime of burglary, it is necessary that it should be committed in *the night time*, and whether, or not, there be light enough to distinguish a man's face, is immaterial to the offence.—*Thomas* v. *State*, 160.

2. The raising of a window-sash which was down, and which was the only obstacle to ingress through the window, and the entry of the accused through the same, is a sufficient breaking in law to constitute burglary.—*Frank* v. *State*, 1474.

CHALLENGE.

See *Grand Jury*, *Jury*.

1. Challenge to the array is an irregular form of pleading, whereby the party excepts to all the jurors returned upon the *venire*, for some original defect in making the return thereto; and must relate to the acts of the sheriff, and should charge a particular default or partiality in forming the array. Consequently, the want of legal qualification in a juror, placed upon the panel, is no ground of challenge to the array.—*Woodsides* v. *State*, 95.

2. Except in capital cases, the court has no authority to entertain a challenge to the array of the *venire facias*; or award a special *venire*, only when there is none of the regular *venire* in attendance on the court; and an indictment found by a grand jury selected from the special *venire* is void.—*Baker* v. *State*, 523.

3. Upon the challenge of a juror it is proper for the court to interrogate and try him as to whether he has formed or expressed an opinion in relation to the matter in issue, and to reject him if found to have formed such opinion.—*Marsh* v. *State*, 839.

4. It is the duty of the court to see that an impartial jury is empanelled, and that it is composed of persons above all exception.—*Ib.*

CHARACTER.

See *Evidence*, *Witness*.

1. On the trial of a prisoner for murder, where the fact of the killing by the prisoner has been clearly proved, evidence as to the character of the prisoner for peace or violence, is inadmissible; but if the guilt of the prisoner be doubtful, such testimony is admissible, and is not confined to the general character of the prisoner, but must have

reference to the nature of the charge against him; but rebutting testimony as to character may be introduced by the prosecutor, and the presumption arising from such evidence of general character is of little weight.—*McDaniel* v. *State*, 386.

2. On the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood, as well by the accused as others, to be a quarrelsome, vindictive, and dangerous man, is inadmissible.—*Wesley* v. *State*, 1259.

3. The good character of the accused, when satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the jury with the other facts of the case. But it is insufficient to raise a reasonable doubt in the minds of the jury, when, excluding such proof, the evidence is sufficient to satisfy them of the guilt of the accused.—*Ib.*

CIRCUIT COURT.

1. An indictment may be found at the special terms of the circuit court.—*Young* v. *State*, 106.

2. The circuit courts derive their criminal jurisdiction and the powers necessary to enforce it from the sixteenth section of the Circuit Court Law, which declares that they shall "have and exercise all the powers incident or belonging to a court of oyer and terminer, and general jail delivery." This statute vests in the circuit courts, without further legislation, the subject-matter pertaining to courts of oyer and terminer, and general jail delivery, and also confers on them all the incidents, a necessary means of enforcing their jurisdiction.—*Shaffer* v. *State*, 65.

3. The jurisdiction of the county court, under the old constitution, for the trial of slaves, was only concurrent with that of the circuit court. The new constitution took effect, from the time of its adoption, in all cases, unless specially excepted, and by it the jurisdiction of the trial of slaves was taken from the county court and transferred to the circuit court, and the county court abolished.—*Byrd* v. *State*, 73.

4. Special terms of the circuit court, like the regular terms, are regulated by law; and the certificate of the clerk, and the allegations in the indictment that it was found at a special term, will be deemed by this court sufficient evidence of that fact.—*Ib.*

5. The circuit courts, as courts of oyer and terminer, have power to issue writs tested and returnable within the same term; and it is no objection to a *venire facias*, that it commands the sheriff to summon a jury *from the county*, instead *of the county*; the word "from" not authorizing him to summons persons out of his county.—*Woodsides* v. *State*, 95.

6. The judgment of the circuit court upon an appeal from the decision of a justice of the peace and five slaveholders, convicting a slave of an offense not capital, is final, and not revisable in the High Court of Errors and Appeals.—*Minor* v. *State*, 1220.

7. The legislature of this state has the power to provide for a division of a county into two districts, and the holding of a circuit court in each; and where this is done, it may also be provided that the grand and petit jurors for each district shall be taken alone from that district in which the court is held, in which they are required to serve, and not from the whole body of the county.—*Alfred* v. *State*, 1235.

CIRCUMSTANTIAL EVIDENCE.

See *Evidence*.

1. The legal test of the sufficiency of evidence to authorise a conviction, is its sufficiency to satisfy the understanding and conscience of the jury; and a juror ought not to convict unless the evidence excludes from his mind all reasonable doubt of the guilt of the accused.—*Cicely* v. *State*, 435.

2. As an abstract proposition, the force of circumstantial evidence to warrant a conviction, ought in no case to be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence. And the direct testimony of a single witness ought not to authorise a conviction, unless it were in itself sufficient to

exclude from the mind of the jury every reasonable doubt of the guilt of the accused. —*Ib.*

8. Circumstantial evidence has been received in every age of the common law, and it may rise so high in the scale of belief as to generate full conviction. When, after due caution, this result is reached, the law authorizes its ministers to act upon it.—*McCann* v. *State*, 486.

4. What circumstances will amount to proof, can never be matter of general definition; the legal test is the sufficiency of evidence to satisfy the understanding and conscience of the jury. It is sufficient if they produce moral certainty, to the exclusion of every doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature.—*Ib.*

5. In cases depending upon circumstantial evidence, a number of links often concur in forming the chain. It cannot be said what bounds are to circumscribe the inquiry. All which may tend to elucidate the transaction should be admitted.—*Ib.*

6. The union and concurrence of various detached circumstances may produce full conviction, when either of them standing alone might leave room for much doubt.—*Ib.*

7. While circumstantial evidence is in its nature capable of producing the highest degree of moral certainty, yet experience proves that it is a species of evidence, in the application of which the utmost caution and vigilance should be used.—*Alghavi* v. *State*, 656.

8. It is the exclusion of every other hypothesis, which invests mere circumstances with the force of truth. Whenever the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be.—*Ib.*

9. What circumstances will amount to proof, can never be a matter of general definition; the legal test of its sufficiency to authorize a conviction, is its power to satisfy the understanding and conscience of the jury. Absolute metaphysical demonstration is not essential to proof by circumstances. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt. As to the case at bar, SMITH, C. J., *dissented.*—*Browning* v. *State*, 991.

10. Where an instruction which is erroneous is given upon a material point in the cause, a judgment rendered in accordance with it will be reversed, unless it manifestly appear from the whole record that no prejudice was done to the party complaining, and that the judgment was clearly correct. *Semble:* Especially in cases of circumstantial evidence is this rule applicable.—*Josephine* v. *State*, 1439.

11. A case of circumstantial evidence reviewed, and decided insufficient.—*Caleb* v. *State*, 1490.

12. Where a person of generally good health dies suddenly, and the symptoms and appearances indicate narcotic poison of Jamestown weed or *stramonium*, but are similar to the symptoms common to disease of the heart, or congestion of the brain or stomach, and the testimony and opinions of several physicians who examined the stomach and contents, without any analysis, is conflicting, and leave it in doubt, with the probabilities equally balanced, whether the deceased died of poison or was diseased —these facts, though accompanied by proof of a confession of the accused that he had administered Jamestown weed, are not sufficient to warrant a conviction.—*Pitts* v. *State*.

13. Circumstantial evidence should be acted on with great caution, especially where the public anxiety for the detection of a great crime creates an unusual tendency to exaggerate facts and draw rash inferences.—*Ib.*

14. In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases, in order to a conviction, the evidence must produce moral certainty of guilt, to the exclusion of every other hypothesis.—*James* v. *State*, 1741.

15. In both civil and criminal cases a verdict may be founded on circumstances alone; and these often lead to a more satisfactory conclusion than direct evidence.—*Ib.*

16. But although circumstantial evidence in a case of assassination, to justify a conviction

of murder, should tend to exclude every other supposition but that of guilt, it need not necessarily be such as to render it *impossible* that any other person besides the defendant could have committed the deed.—*Ib.*

COMMITMENT.

1. The judge of the criminal court may re-examine the causes of commitment, and remand or discharge the prisoner, according to his own belief of his innocence or guilt. —*State* v. *Doty*, 23.
2. Every order of commitment must show a previous conviction. Therefore a naked order of the court, that a person be imprisoned until he signifies his assent to answer questions to the grand jury, without showing a previous conviction for contempt, is void, and the person should be discharged from custody.—*Adams, ex parte*, 665.

COMMON LAW.

See *Constitutional Law, Statutes.*

1. The common law is recognized by the constitution as a part of the law of this state, but it may be altered or abolished by the legislative power.—*Noonan* v. *State*, 212.

CONFESSIONS.

See *Evidence.*

1. It is a well recognized principle of law, that the confessions of the accused cannot be given in evidence against him, when they appear to have been forced from the mind by fear, or obtained by the influence of hope; and testimony is admissible to show under what circumstances confessions or gestures of the accused were made. Nor are such confessions, made before a magistrate, admissible, if made through fear of bodily harm, or induced by the persuasion of hope.—*Serpentine* v. *State*, 82.
2. Where the prisoner offered to introduce witnesses to prove that, on the night previous to the examination before the magistrate, he had been taken from his bed after night, bound to a tree, and lashed in the severest manner, and also to prove that the actors in the scene were present at the time the prisoner made his confession before the magistrate, such proof was competent, and to reject it was error.—*Ib.*
3. Where it appears that neither the witness nor any one else, at the time, placed any particular motive of temporal advantage or fear before the mind of the prisoner, but simply told him to tell all he knew concerning the murder of the deceased, and he then, without any compulsion or any promise, made his statements, they were held to be competent evidence to go to the jury. It is a well-settled rule, and it must clearly appear to the court, in order to exclude them, that the confessions were superinduced by promises of temporal advantage or threats of temporal punishment.—*Peter* v. *State*, 124.
4. Where a justice of the peace, upon a preliminary examination of the accused before him, took down in writing, his confessions made at the time, it is error to permit him, upon the final trial of the accused, to testify from his recollection, in relation to such confessions; the production of such written statements, being unaccounted for.—*Ib.*, 249.
5. The general rule of law is, that confessions when made under the influence of a sufficient threat, or of a sufficient promise, are not admissible in evidence. Subsequent confessions, however, are admissible, if made under such circumstances as create a reasonable presumption that the threat or promise had ceased to have any influence upon the mind of the accused.—*Ib.*
6. The presumption of law is, that the influence of a threat or promise, once made, continues to operate; this presumption may be rebutted by other proofs, showing that it had ceased to operate.—*Ib.*
7. Where a slave, who had been charged with crime, and was threatened by a party armed with guns, that if he did not confess he would be hanged, did therefore confess

his guilt; and shortly afterwards, was taken before the magistrate, accompanied by some of these same persons, and was interrogated by the magistrate as to his guilt, without being previously cautioned by the magistrate of the effect of his replies, and he again made confessions of his guilt, *held*, that the last confessions of the accused were not admissible as evidence against him.—*Ib.*

8. Statements or confessions must be delivered to the jury precisely as they were made; certain facts cannot be detailed to the jury and others withheld. It is for the jury to give such weight to the whole as in their opinion it merits; but they may believe one part and wholly disregard the rest.—*Coon* v. *State*, 455.

9. A jury may believe that part of a confession which charges the prisoner, and reject that part which is in his favor, if they see sufficient grounds for so doing.—*McCann* v. *State*, 486.

10. The answer of the accused to a question asked subsequent to the commission of the offence, is no part of the *res gestæ*, and was properly excluded from the jury.— *Bolin* v. *State*, 593.

11. Where confessions were made on one day, under the influence of fear from previous whipping, and a threat of further punishment, and were repeated the day following to another person, (the master of the accused,) such repeated confessions are properly presumed to have been made under the same fear and apprehension, and ought not to be given in evidence on the trial.—*Van Buren* v. *State*, 604.

12. In the case of Peter, (a slave,) v. The State, cited by the court, they say, "that after the fact is known, that either the influence of hope or fear existed, superinducing the confessions, explicit warning should be given to the prisoner of the consequences of a confession, and it should be likewise manifest that the prisoner understood such warning, before his subsequent confessions could be given in evidence.—*Ib.*

13. The prisoner's confession, when the *corpus delicti* is not proved by testimony *aliunde*, is insufficient to warrant a conviction.—*Stringfellow* v. *State*, 691.

14. In order to render the confessions of a prisoner competent evidence against him, it is not necessary to inform him of his rights, or that he is not bound to confess. All that is necessary is that they must be free from compulsion.—*Dick et al.* v. *State*, 811.

15. It is too late, after a confession has gone to the jury without objection, for the prisoner to object and move for its exclusion.—*Ib.*

16. Where a witness for the state was allowed to testify that the accused had confessed to him that he was guilty of the offence charged against him, and that he had heard him soon afterwards, on the same evening, make other confessions to other persons, the accused has a clear right to cross-examine the witness on that subject, such examination being material to the issue to be tried by the jury.—*Dick* v. *State*, 842.

17. A confession of guilt by the accused cannot be given to the jury in evidence against him on a trial for murder, unless it appears that such confession was entirely voluntary. The prisoner has the constitutional right to remain silent as to his guilt; and hence, if a confession be extorted or induced by violence or threats of violence, or by hope of reward or immunity from punishment, it cannot be given in evidence to the jury.—*Jordan* v. *State*, 928.

18. The state, itself, being restrained by the constitution from compelling an accused party to testify against himself, the courts can give no countenance or sanction to such compulsion when exercised by private persons. Hence, all that may be thus wrung from the accused must be rejected.—*Ib.*

19. Confessions of an accused person are not the highest and most satisfactory proof of guilt.—*Brown* v. *State*, 974.

20. Distinction should be made between confessions deliberately made, and those made in casual conversation.—*Ib.*

21. The confessions of a slave made to his master are not privileged communications, and are properly admissible in evidence against him, if made freely and voluntarily, and without any undue influence being exerted to obtain them.—*Sam* v. *State*, 1037.

22. The master, after the arrest of the slave, chained him; and whilst they were together alone, he asked the slave why he had burned the gin-house—assuming, in the

form in which he put the question, that the slave was guilty, but used no force to extort the confession; whereupon the slave confessed the burning, and said he had committed the crime because he wished to be hung. *Held:* That the means used to obtain the confession were not improper, and the confession was properly admitted as evidence.—*Ib.*

23. Though confessions improperly obtained from accused are not admissible, discoveries made and acts done in consequence of such confession, and in corroboration thereof, are admissible. And whether such confession, so corroborated, may not also be admitted on account of the corroboration, *quære.*—*Belote* v. *State*, 1120.

24. By means of a confession improperly obtained, property alleged to have been recently stolen was found and identified; *held*, that the finding was admissible in evidence against the accused, whether the confession was or not.—*Ib.*

25. The rules respecting confessions improperly obtained, considered.—*Lynes* v. *State*, 1208.

26. A confession by a prisoner to his jailor, on several occasions, is admissible as evidence against him, although before his confinement he had been induced to make the confession by undue influence.—*Simon* v. *State*, 1226.

27. A confession is not admissible in evidence unless it is made freely and voluntarily, without restraint, and without hope of reward or fear of punishment.—*Ib.*, 1229.

28. Confessions made after very slight expressions, calculated to convey to the mind of the party confessing that he would obtain any benefit if he would confess, is inadmissible; and this rule applies in cases of the confessions of the guilt of others as well as of the guilt of the person confessing.—*Ib.*

29. A confession made on the same day, and a few hours after a prior confession had been made under a threat or promise, and in the presence of some of the same persons to whom the first confession was made, and without any caution having been given to the prisoner, is presumed to have been made under the influence of the threat or promise before made, and is not admissible in evidence.—*Ib.*

30. The prisoner, who was a runaway slave, was caught and severely bitten by dogs. He was not suspected of the murder, and being asked by a white person why he ran away, he refused to answer; whereupon he was struck down, and warned that if he did not talk, he would be knocked down again. The prisoner was asked by the same person "what he knew about Hiram's killing Norvell," adding at the same time, that "it would be better to tell all about it." The prisoner then stated that Hiram did not kill the deceased, but he, the prisoner, did it. *Held*, that the confession was not voluntary, and therefore inadmissible.—*Ib.*

31. Where a slave confessed to a stranger in the absence of his master, and afterwards confessed to his master, and giving his reasons for committing the deed, the introduction of the first confession against the slave did not authorize him to introduce in his own favor the second confession.—*Alfred* v. *State*, 1235.

32. In order to render declarations competent evidence in favor of the declarant, on the ground that they are part of the *res gestæ*, it is essential that they should have been made contemporaneously with the main fact which they are offered to illustrate, and whilst the transaction they are supposed to explain was being carried on; and hence the declarations of a party accused of murder, made just before the killing, and while the deceased was absent, and when the accused did not suspect that a conflict with the deceased was impending, is inadmissible in his favor.—*Newcomb* v. *State*, 1303.

33. Statements made by the prisoner on the trial of another person charged with the same offense as himself, for which he is indicted, is not admissible in evidence against him.—*Josephine* v. *State*, 1439.

34. The fact that another slave was being whipped in the hearing of the accused "in relation to matters connected with the offense with which the accused is charged," does not make a confession, soon afterwards made by the accused, otherwise than free and voluntary, where it does not appear that the whipping of the other slave was done for the purpose of coercing any confession or discovery from him in relation to the crime charged against the accused, and it is not shown that the whipping could have

had any influence on the accused to cause him to make a confession.—*Freak* v. *State*, 1474.

35. Anything reasonably tending to hold out the hope or promise of reward or benefit, for confession or fear of punishment or injury for the failure to confess, is an unwarrantable inducement, which renders the confession so obtained incompetent evidence. But it is not every inducement that will render a confession inadmissible. An appeal to the character and circumstances of the party—to his responsibility to a tribunal above all earthly courts—to his situation and circumstances, might be an inducement to confess; yet such inducements would not render the confession inadmissible. Hence, an instruction which directed the jury to disregard the confession of the accused, if it were made under "any inducement whatever," is erroneous, and should not be given.—*Ib.*

36. Though the finding of stolen goods in the possession of the accused, or their discovery at a place where they have been hid in consequence of information derived from him, is generally presumptive evidence of larceny only by the accused, yet if a burglary be proven to have been committed, and the accused makes a circumstantial confession of his entry of the house and taking of the goods, and then discovers the place of their concealment, in accordance with which they were found, such disclosure and finding are presumptive evidence that the accused committed the burglary.—*Ib.*

37. An instruction that assumes that statements made by an accused are a confession of his guilt is erroneous. It is for the jury to determine, upon consideration of his whole statements, whether or not they show guilt, and that is a matter entirely for their determination.—*Hogsett* v. *State*, 1505.

38. An instruction which assumes the grade and weight of a supposed confession is erroneous. It is the duty of the court to admit the evidence, and to tell the jury that it is competent evidence to be considered by them; and this is the whole extent of the power of the court over the matter.—*Ib.*

39. In criminal cases the *corpus delicti* must be proven by direct and independent testimony; and without such proof of the *corpus delicti*, evidence of a confession is inadmissible.—*Jenkins* v. *State*, 1526.—*Pitts* v. *State*.

40. The rule as to the admission of confessions as evidence is, that they must be voluntary and free, not induced by the expectation of any advantage held out or promised, nor extorted to escape harm or injury present and imminent or threatened. Confessions must not proceed from a mind influenced to make them by the hope of a reward or benefit offered; or by the fear of injury or punishment threatened. Some extraneous pressure in the one direction or the other must be proved in order to show that the confessions are not voluntary. Whether the confessions in a particular case ought or ought not to be received in evidence, depends very much on the special circumstances of that case.—*Cody* v. *State*, 1678.

41. Where the confessions have been induced by a promise or by a threat, similar admissions subsequently made, will be presumed to have been made under the same motive, unless all the facts accompanying it remove such presumption, and create the belief that such motive had ceased to have influence on the mind.—*Ib.*

42. Anything reasonably tending to hold out the hope or promise of reward or benefit for confession, or tending to create a fear of punishment or injury for the failure to confess, is, in law, an unwarrantable inducement to confess. But an appeal to the character or circumstances of the party, such as his family, his situation in life, the claims of justice of others whose rights or safety may be involved in his declaring the truth, to his responsibility to the Almighty for falsification or suppression of the truth, these might be inducements to make a confession, and yet such confessions would not necessarily be incompetent, the inducement not being illegal.—*Ib.*

43. The relation of the party to whom the confession is made, has much to do with its competency as evidence. If made to one in authority in response to an inducement offered, especially if the official personage be in position likely to enable him to render his inducement effectual, it should be promptly rejected.—*Ib.*

44. CASE.—It appeared in evidence that about eight o'clock on the night of the homicide,

the accused was at the house of deceased. They were heard mutually quarrelling, but they did not seem so angry as to excite apprehension on part of witness. On next morning at eight or nine o'clock deceased was found dead about one hundred yards from her house, her skull being fractured, a good-sized stick lying near the body. Matthews arrested accused next morning, rode up to him in a field about a mile from the place of the homicide, and told him some one had shot the deceased. He replied that she was not shot, but knocked on the head. At that time eight or ten freedmen came up from different directions and tied accused, and took him to where the body of deceased was, and where one hundred or one hundred and fifty freedmen had collected, and were much excited, and who insisted that accused should be hung. No threats or promises were made to extort confession. Accused's hands were tied and a large crowd collected around him. Accused said he and deceased had a quarrel about some clothes, the deceased struck him and he struck her one blow, not intending to kill her. *Held:* That such confession was properly admitted in evidence to the jury on the trial.—*Ib.*

45. The declarations of the defendant, made at the time of the shooting, as to the effect of his shot, are not "confessions in the technical sense," but connect themselves with the act, and form part of the *res gesta*, and are clearly admissible in evidence.—*Head* v. *State*, 1700.

CONSPIRACY.

1. The doctrine of merger does not apply to the offense of conspiracy of slaves to murder a white person. Nor was the statute (Hutch. Digest, 983, § 21) which declares "that no person shall be convicted of an assault with intent to commit a crime, or any other attempt to commit an offense, when it shall appear that the crime intended, or the offense attempted, was perpetrated at the time of such assault, or in pursuance of such attempt," designed to apply to this class of cases.—*Laura* v. *State*, 700.
2. Before the statements of co-defendants can be given in evidence against each other respectively, there must be a *prima facie* case established by evidence *aliunde*. —*Browning* v. *State*, 860.
3. If the combination for illegal purposes be once established, then the acts and words of every person party to such combination, and in furtherance of the common design, is the act of all, and all are alike responsible.—*Ib.*
4. The statements of one or more conspirators are admissible against the others if made in the progress or in prosecution of the common design; provided, however, that the conspiracy be first established by proof *aliunde*.—*Lynes* v. *State*, 1208.
5. It is well-settled law that before the acts and declarations of one party can be received in evidence against another, in a criminal prosecution, there must be proof of a conspiracy, *aliunde*. The words themselves do not prove the conspiracy, or tend to prove it; and, therefore, such declarations are mere hearsay. But it is quite as well settled by authority that a "conspiracy may be proved, like other controverted facts, by the acts of parties, or by circumstances, as well as their agreement."—*Street* v. *State*, 1591.

CONSTITUTIONAL LAW.

1. By the words "speedy trial," as used in the constitution of this state, in guarantying to every one indicted a speedy trial by an impartial jury, is meant a trial regulated and conducted by fixed rules of law; and any delay created by the operation of those rules, is not within the meaning of the constitutional provision.—*Nixon* v. *State*, 226.
2. The words "bill of credit," as used in the constitution of the United States, mean "a paper medium, intended to circulate between individuals and between the government and individuals, as money, for the ordinary purposes of society."—*Pagaud* v. *State*, 278.
3. The statute of 1832 reserves to the legislature the right to dispose of the entire two sections of land designated by the commissioners to locate the seat of government, except the streets and lots which may be sold from time to time. This vests the title to the streets in the corporation of the city, and deprives the legislature of the power

to dispose of them, except so far as the *jus publicum*, or right of domain, may authorize it. This right of domain always exists, unless the state has absolutely parted with it by grant.—*Donnaher* v. *State*, 374.

4. There is a necessary exception in the title of all property, that if it be necessary for public use, it may be taken for such purpose, provided that just compensation shall be made to the owner.—*Ib.*

5. The property of a corporation is not less liable to the exercise of the *jus publicum* than the property of a private individual. A corporation is an ideal individual, and is to be treated as other individuals.—*Ib.*

6. So much of the 2d section of the act of March 6th, 1850, "to suppress trade and barter with slaves," as declares that "the name of the slave, or of his owner, or the kind or quantity of the produce or commodity bought or sold, need not be stated," is in direct conflict with the 10th section of the bill of rights which secures to every accused, the right "to demand the nature and cause of the accusation against him; and an indictment under this act, that does not allege these facts, is defective and must be quashed.—*Murphy* v. *State*, 618.

7. Although it has been held that sec. 2 of the act prohibiting trade and barter with slaves, which dispensed with the averment and proof of the kind of produce or commodity bought or sold, is invalid under sec. 2 of the bill of rights, yet, an indictment under this statute containing the necessary averments, is valid, and should be sustained.—*Ib.*, 765.

8. Under the constitution of 1832, and the laws in force in 1855, the governor of this state had power to fill vacancies in the office of circuit judge by temporary appointment, till the election and qualification of a judge should occur; and this, although the unexpired term exceeded one year, and no special election had been ordered. Per HANDY, J.—*Sam* v. *State*, 893.

9. Judicial districts may be so changed by law as practically to transfer the judge to another district.—*Miazza* v. *State*, 1205.

10. The legislature of this state has the power to provide for a division of a county into two districts, and the holding of a circuit court in each; and where this is done, it may also be provided that the grand and petit jurors for each district shall be taken alone from that district in which the court is held, in which they are required to serve, and not from the whole body of the county.—*Alfred* v. *State*, 1235.

11. Slavery, as it exists in the United States, was unknown to the common law of England; and hence its principles are inapplicable to offenses committed by or upon a slave.—*George* v. *State*, 1249.

12. Statutory enactments do not extend to or include slaves, either to punish or protect them, unless they are specifically mentioned, or are included by necessary implication.—*Ib.*

13. After the expiration or repeal of a law, no penalty can be enforced nor punishment inflicted for violations of it committed while it was in force, unless some special provision be made for that purpose by statute; and penalties incurred under such repealed or expired statute must be collected before, and cannot be collected after the repeal or expiration of it.—*Teague* v. *State*, 1264.

14. T. was indicted for selling liquors in violation of a statute which prohibited the sale of vinous and spirituous liquors within a certain locality, in any quantity whatever; he entered into recognizance for his appearance, which he forfeited, and judgment *nisi* was entered against him and his sureties. The act under which he was indicted was then repealed, but the repealing act provided that, "it should not be construed as to release or discharge from punishment any one who had violated the act intended to be repealed, by selling vinous and spirituous liquors in less quantities than one gallon." *Held*, That this last act must be construed so as to save a prosecution under the first act, although the indictment did not charge the sale in less quantities than a gallon, and that on a trial of that indictment after the date of the repealing act, the state would be held to prove that the sale was in less quantities than a gallon; and, therefore, that the judgment *nisi* should be final.—*Ib.*

18. After the act of secession of 1861, the state of Mississippi was a government *de facto et de jure*; its constitution and laws remained the same, except so far as altered by its own acts; rights of property are to be governed, contracts to be construed, and crimes to be tried and punished by the same laws that existed before the date of the act of secession, or that have been enacted since.—*Harlan* v. *State*, 1511.

16. The laws of the state of Mississippi, as they stood at the date of the ordinance of secession, continued in force afterwards, precisely as before, unaffected by that ordinance, or by the war, by the depositions of the state magistrates in May, 1865, or by their restoration in the fall of that year. Offenses against the criminal laws, committed during the war, or during the occupation of the state by the armed forces of the United States, are indictable and punishable now, as if these events had never occurred.—*Ib.*

17. The jurisdiction over crimes, conferred by law upon the county courts, is not an exclusive jurisdiction, but concurrent with that of the circuit court.—*Ib.*

18. The clause of the constitution forbidding states to pass laws impairing the obligation of contracts should be read and considered in connection with the ancient principles of the common law.—*Miss. Society of A. & S.* v. *Musgrove*, 1723.

19. Not all legislation which may, incidentally, have the effect to impair contracts, is obnoxious to the constitutional prohibition. Illustrations of the exceptions, which may be upheld, with the limitations, which must be enforced.—*Ib.*

20. The constitutional prohibition, being addressed to the "state," applies as much to the framers of a state constitution as to a legislature.—*Ib.*

21. The legislature may take away, by statute, what has been given by statute, unless rights under it have vested. This rule illustrated.—*Ib.*

22. A lottery grant is repealable except when contracts have been made or rights vested, as between the grantees and others, which a repeal would infringe.—*Ib.*

23. There seems to be no disagreement in the authorities that, if no consideration has been paid for a license, it is open to repeal.—*Ib.*

24. Whether the prohibitory clause in favor of contracts can ever be allowed to affect the power of the state to enact police regulations for the protection of health and morals; and whether, on account of their pernicious and demoralizing influence in the community, lottery companies who have paid a bonus may not still be included in the repealing power, *quære*.—*Ib.*

25. If plaintiff had even made formal tender of full performance of all the conditions precedent to the enjoyment of their franchise before the repealing laws took effect, these repealing laws would have swept away their franchise, because no contract had been perfected, and no right vested before the business became unlawful, *quære*.—*Ib.*

26. It seems *passim*, that lottery enterprises should be regarded as of evil and demoralizing character and tendencies.—*Ib.*

CONTEMPT.

1. The right of all courts of justice to punish, by fine and imprisonment, for contempt of their authority, is an inherent right pertaining to them, and which they would have power to exercise independent of any statute.—*Adams, ex parte*, 665.

2. Every order of commitment must show a previous conviction. Therefore a naked order of the court, that a person be imprisoned until he signifies his assent to answer questions to the grand jury, without showing a previous conviction for contempt, is void, and the person should be discharged from custody.—*Ib.*

CONTINUANCE.

1. The continuance of a cause is a matter in the sound discretion of the court; and putting the prisoner upon his trial for violating a penal statute at the same term of the court at which the indictment has been found against him, is not ground of error.—*State* v. *Nos*, 153.

2. In criminal cases it should not be allowed or encouraged, except in very extreme cases, to admit what the prisoner, in his application for a continuance, stated he

expected to be proved by the absent witness; but when such admission has been once made, it constitutes an admission, not merely that the absent witness would have sworn to certain alleged facts, but, also, that the facts alleged are absolutely true.—*Domingues* v. *State*, 302.

3. The statute, H. & H., 610, § 37, provides that upon every application for a continuance, the party shall set forth in his affidavit the facts which he expects to prove by his absent witness or witnesses, in order that the court may be able to judge of the materiality of such facts to the issue or issues in the case; this rule applies also to criminal cases.—*McDaniel* v. *State*, 336.

4. The continuance of a cause is matter resting in the sound discretion of the court, and an appellate tribunal will never interfere to control the exercise thereof but with extreme reluctance and caution. To justify such interference, there must have been some palpable error committed, without the correction of which manifest injustice will result.—*Ib.*

5. A continuance should not be granted on account of the absence of a material witness, unless the affidavit shows that proper efforts were made to secure his attendance, and that they failed.—*Weeks* v. *State*, 903.

6. If the court should improperly refuse to grant an application for a continuance on account of the absence of a material witness, the error will be cured if the witness appear during the progress of the trial and testify in the cause.—*Ib.*

7. The refusal of the court to grant a continuance on the affidavit of the defendant, that material witnesses are absent, when the state admits as true the facts expected to be proved by such witnesses, is no ground of error.—*Browning* v. *State*, 991.

8. Applications for continuance are always addressed to the sound legal discretion of the court; and it is only where this discretion has been greatly abused that it can be assigned for error.—*Ogle* v. *State*, 1869.

9. An affidavit that subpœnas had been issued for absent material witness which were returned "not executed" by the sheriff, and that he expected to prove by such witnesses an unfriendly feeling between the deceased and the defendant, is insufficient for a continuance.—*Ib.*

CONVICTION.

1. No person can be subjected to punishment for any offence, unless a conviction be had upon an indictment found by a grand jury of the county in which the offense was committed.—*Laura* v. *State*, 700.

CORPUS DELICTI.

See *Confessions*, *Evidence*, *Homicide*.

1. The *corpus delicti* in a case of arson is the burning of the house; and if that fact be established by evidence *aliunde*, the confessions of the accused are admissible to show that the burning was done feloniously, and that he was the criminal agent.—*Sass* v. *State*, 1037.

2. In criminal cases the *corpus delicti* must be proven by direct and independent testimony; and without such proof of the *corpus delicti*, evidence of a confession is inadmissible.—*Jenkins* v. *State*, 1526.—*Pitts* v. *State*.

3. In cases of homicide the *corpus delicti* consists of two fundamental and necessary facts; 1st, the death; and, 2d, the existence of criminal agency as its cause.—*Pitts* v. *State*,

4. The death must be proved by direct testimony, or by presumptive evidence of the strongest kind; and the criminal agency may then be established by presumptive reasoning upon all the facts and circumstances of the case.—*Ib.*

5. When the dead body or remains have been discovered and identified, and the immediate cause of death remains unknown, the sworn observations and opinions of physicians, surgeons, chemists, and other scientific persons who have examined the body or remains, are often of the greatest value as testimony explaining the means of death.—*Ib.*

6. Facts ascertained by reason of a confession may be considered in establishing the *corpus delicti*; but a confession not made in open court or before the examining magistrate, but to an individual, uncorroborated by circumstances and without proof *aliunde*, that a crime has been committed, will not justify conviction, but the *corpus delicti* must be proved independently of extra-judicial confessions, and beyond reasonable doubt; and without such proof of the *corpus delicti*, evidence of the confession is inadmissible at the trial.—*Ib.*

CRIMINAL COURTS.

1. The 22d section of the act establishing the criminal court, provides that the judge may, when he deems it necessary, hold a special term on giving twenty days notice thereof. No formal order is necessary for holding such term, and the propriety thereof is wholly within the discretion of the judge.—*Friar* v. *State*, 114.
2. The twenty days notice by advertisement, required by the statute, is for the information of the public, but is not necessary to confer jurisdiction; the statute being merely directory.—*Ib.*
3. The criminal court for the counties of Warren, Claiborne, Jefferson, Adams, and Wilkinson, established by the act of 1836, was a court of inferior and limited jurisdiction under the constitution, and one which the legislature was clearly empowered to establish by the 24th section of the 4th article of the constitution.—*Thomas* v. *State*, 160.

DEMURRER.

1. In indictments for misdemeanors, if a demurrer be sustained to the defendant's plea in abatement, the judgment is *respondeat ouster*.—*McGuire* v. *State*, 1097.
2. The overruling of a demurrer to the replication of the state, when the replication is afterwards withdrawn by the district attorney, is no ground of error.—*Rocco* v. *State*, 1280.
3. The withdrawal of a replication by the state, after a demurrer to it has been overruled, is no error.—*Ib.*

DEPOSITIONS.

1. The substitution of depositions for oral testimony belongs to civil proceedings. In no state of circumstances under our constitution can the deposition of a witness be used against the defendant in a criminal prosecution; and the same rule holds as to the deposition of a witness in his favor, unless by his consent; and therefore, where a defendant makes an affidavit for a continuance, on account of the absence of witnesses, setting forth what they will prove when present, the state cannot force him into a trial by admitting the truth of what the absent witness would testify.—*Domingos* v. *State*, 302.

DEPUTY SHERIFF.

1. It is sufficient if the record shows that the jurors, who tried the defendant, were summoned by the deputy sheriff, his acts as such deputy being, in legal effect, the acts of the sheriff; and it cannot be objected to the verdict that the court *dismissed* the sheriff from the duty of summoning *tales* jurors, as such order or action of the court would be null and void.—*Kelly and Little* v. *State*.

DISTRICT ATTORNEYS.

1. The district attorney is the proper person to prosecute, and so far as official acts in prosecutions are required by law to be done in a particular way, or to assume permanent character, he is required, and is the only one authorized, to discharge such duties; such as signing indictments, and all other proceedings of an official character on the part of the state. When these have been performed, it is not error for the

district attorney to withdraw from the prosecution, and for other counsel to appear on the trial in his stead.—*Byrd* v. *State*, 73.

2. The duty of the district attorney is to prosecute offenders; but in his absence the state has a right to employ other counsel, and the duty performed by them will be valid.—*Keithler* v. *State*, 403.

3. The legislature has power by the constitution, to provide for the filling of all vacancies; and if the absence of the district attorney cause even a temporary vacancy it may be provided for by legislation.—*Ib.*

4. A prosecuting attorney has the discretion to quash an indictment or enter a *nolle prosequi* at any time before the jury is empaneled and the prisoner arraigned for trial. —*Clarke* v *State*, 530.

DYING DECLARATIONS.

See *Evidence.*

1. It is a common law doctrine that the declarations of deceased persons, made after the reception of the mortal wound, and under the declared apprehension of death, are admissible as evidence on the trial of the accused; and the 10th section of the bill of rights, declaring "that in all criminal prosecutions the accused hath a right to be heard by himself and counsel, to demand the nature and cause of the accusation, and to be confronted by the witnesses against him," &c., is but an affirmance of this long-cherished principle of the common law.—*Woodside* v. *State*, 95.

2. The dying declarations of one who has been killed, are admissible in evidence against the slayer, notwithstanding the constitutional provision that the accused "shall be confronted with the witnesses against him;" their admissibility is confined to cases of homicide only.—*McDaniel* v. *State*, 336.

3. It is essential to the admissibility of dying declarations, and it is preliminary to be proved by the party offering them in evidence, that *they were made under a sense of impending death*; but it is not necessary that they should be stated at the time, to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be proved directly by the expressed language of the deceased, or be inferred from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case.—*Ib.*

4. Dying declarations under the following circumstances were admitted in evidence: On the day the mortal stroke was given, the witness told the deceased that he thought his deposition ought to be taken, as, in the opinion of the witness, he must inevitably die before morning; the deceased replied he thought so too; and afterwards exclaimed, "O Lord! I shall die soon." His declarations were reduced to writing, and read over to him twice, and signed by him. The attending physician on the evening previous, had held out to the deceased some hope of recovery, but told him his chance was bad. Deceased lived some ten days after making the declarations.—*Ib.*

5. Declarations are admitted in evidence as part of the *res gestæ* only upon the presumption that they elucidate the facts with which they are connected, having been made without premeditation or artifice, and without a view to the consequences.—*Scaggs* v. *State*, 384.

6. Two considerations unite in the admission of dying declarations: The necessity of the case, and the situation of the declarant. The danger of impending death is an equivalent to the sanction of an oath. And the same rules apply, in these cases, to slaves as to white persons.—*Lewis* v. *State*, 392.

7. The presumption of law is in favor of the proper religious culture in slaves, and their belief in revelation and a future state of rewards and punishments; and unless the contrary is shown the declarant will be presumed to have had such belief.—*Ib.*

8. It must be established as a previous fact, before dying declarations can be admitted, that the declarant was sensible of his approaching dissolution.—*Ib.*

9. The fact that the deceased, after the wound was inflicted, cried, "Oh my people!" does not indicate the apprehension of approaching death.—*Ib.*

10. It is the belief of the declarant that his wound is mortal, and of his future accountability, that renders the declarations admissible.—*Ib.*

11. When a conversation was had with the deceased previous to his dying declarations, on the subject of the transaction which caused his death, it is important that such conversation should be made known to the jury, to show that it varied from the dying declarations; and it is error to exclude it.—*Nelms* v. *State*, 509.

12. Objections to the admission of dying declarations must be made on the trial; it is too late to object on writ of error.—*Lambeth* v. *State*, 532.

13. The Bill of Rights, which declares that "the accused shall be confronted by the witnesses against him," does not apply to the admission of the dying declarations of the deceased, in cases of homicide.—*Ib.*

14. Dying declarations are not entitled to the same degree of credibility, as if the deceased had sworn to the same facts in open court, as a witness; and an instruction to that effect is erroneous.—*Ib.*

15. The guilt or innocence of the accused is in no degree dependent upon the question of his or the deceased's title to the land or fence, which had caused the dispute between them and ended in the killing of deceased. If either killed the other with a deadly weapon in order to prevent a trespass in the removal of the fence, such homicide would be murder in the absence or proof that would tend to rebut the presumption of malice arising from the weapon used.—*Ib*

16. The competency of dying declarations is exclusively for the consideration of the court, and having once decided on its competency, it then becomes the province of the jury to decide upon its credibility, who are at liberty, in doing so, to consider all the circumstances under which they were made, and give to the evidence only such merit as they may think it deserves.—*Ib.*

17. Where the court has admitted the dying declarations as competent evidence for the jury, the law raises a presumption that they were made by the party under a due sense of impending dissolution.—*Ib.*

18. Dying declarations are admitted as evidence only in cases of homicide.—*Brown* v. *State*, 974.

19. The party offering declarations of this character must first prove that they were made under a sense of impending death, and when the deceased had given up all hope of surviving. Such a condition is presumed to silence all motives of falsehood, and induce the mind by the most powerful consideration to speak the truth.—*Ib.*

20. But even then, the accuracy of the memory, and coolness of the judgment are, in general, to some extent impaired by wounds or disease. So that it is generally impossible to make as full, clear, and accurate a statement as if in an undisturbed and healthful condition.—*Ib.*

21. Statements made by deceased after the mortal stroke, but before giving up hopes of recovery, and reduced to writing by others, and afterwards, when deceased was conscious of approaching death, sworn to by him, as his dying declarations, are admissible as evidence. But if from such writing part of what deceased said, be omitted, and it appears that the narrative is incomplete, it should be rejected.—*Ib.*

ERROR.

1. No questions can be adjudicated by an appellate court which were not subjects of decision in the inferior court, or which do not appear upon the record in a proper and tangible form. The judgment of every court of competent jurisdiction will be holden to be correct, unless by the record itself, the error is made manifest.—*Byrd* v. *State*, 45.

2. A party, in order to present the question of error in the decision of the court upon the competency and relevancy of evidence, offered on the trial of a cause, or of any matter of fact brought to the consideration of the court, not appearing by the pleadings, should except to the opinion and embody the evidence or facts in the bill of exceptions. If this be not done, the judgment of the court below upon the subject will be regarded as correct.—*Woodsides* v. *State*, 95.

3. Where the accused submits his affidavit, fortified by that of another, setting forth grounds, and praying for a change of *venue*, and the court makes the order changing the *venue* accordingly, he will not be subsequently heard to criticise the regularity of his own proceedings. The court had full jurisdiction to make the order, and this court will not presume against its regularity.—*Loper* v. *State*, 120.
4. The statute requires that the prisoner shall be furnished with a copy of the indictment and a list of the *venire*, two entire days before the trial; and he cannot be compelled to go to trial without it. But if he goes to trial without this, making no objection, he will be deemed to have waived this right, and will not be allowed to object here.—*Ib.*
5. In criminal as well as civil cases, the rule is that the party who complains of the judgment must make the error apparent; and if it is some part of the proceedings not appearing on the face of the record, it must be placed there by the bill of exceptions. —*McQuillen* v. *State*, 358.
6. Every error which would be fatal on demurrer, or in arrest of judgment, will be sufficient to procure a reversal.—*Kirk* v. *State*, 480.
7. The admission of improper testimony, when no objection is made to it at the time, is no ground of error.—*Hogsett* v. *State*, 1505.

EVIDENCE.

1. Where a prisoner had a right to demand a discharge upon showing that he had been imprisoned for two stated terms of the court, without having been prosecuted by indictment and trial, it would be presumed, if the court refused to discharge, that there was no evidence before the court to support the application; or that the contrary was established.—*Byrd* v. *State*, 45.
2. The record of the court showing the conviction of the principal of murder, may be properly admitted on the trial of the accessory, as evidence of the guilt of the principal.—*Ib.*
3. The rule is well settled in this state, that a party may pursue such order, as he thinks proper, in the introduction of his testimony, unless where a foundation is necessary to be laid for the introduction of secondary evidence.—*Ib.*, 73.
4. It is a well recognized principle of law, that the confessions of the accused cannot be given in evidence against him, when they appear to have been forced from the mind by fear, or obtained by the influence of hope; and testimony is admissible to show under what circumstances confessions or gestures of the accused were made. Nor are such confessions, made before a magistrate, admissible, if made through fear of bodily harm, or induced by the persuasion of hope.—*Serpentine* v. *State*, 82.
5. Where the prisoner offered to introduce witnesses to prove that, on the night previous to the examination before the magistrate, he had been taken from his bed after night, bound to a tree, and lashed in the severest manner, and also to prove that the actors in the scene were present at the time the prisoner made his confession before the magistrate, such proof was competent, and to reject it was error.—*Ib.*
6. It is a common law doctrine that the declarations of deceased persons, made after the reception of the mortal wound, and under the declared apprehension of death, are admissible as evidence on the trial of the accused; and the 10th section of the bill of rights, declaring "that in all criminal prosecutions the accused hath a right to be heard by himself and counsel, to demand the nature and cause of the accusation, and to be confronted by the witnesses against him," &c., is but an affirmance of this long-cherished principle of the common law.—*Woodsides* v. *State*, 95.
7. Presumption of a malicious intent, may arise from the character of the weapon used in the perpetration of deed.—*Ib.*
8. The general rule is that hearsay evidence is not admissible. The exceptions to this rule are grounded alone upon necessity. The offense of fornication, charged in the indictment, is one of a specific character, not falling within those exceptions, and must be proved in the mode pointed out by law.—*Overstreet* v. *State*, 112.

9. Where it appears that neither the witness nor any one else, at the time, placed any particular motive of temporal advantage or fear before the mind of the prisoner, but simply told him to tell all he knew concerning the murder of the deceased, and he then, without any compulsion or any promise, made his statements, they were held to be competent evidence to go to the jury. It is a well-settled rule, and it must clearly appear to the court, in order to exclude them, that the confessions were superinduced by promises of temporal advantage or threats of temporal punishment.—*Peter* v. *State*, 194.

10. Where the appellate court reverses the judgment of the court below for the want of form in the indictment, the indictment will be considered sufficient *prima facie* evidence of guilt to remand the prisoner.—*Ib.*

11. On the trial of the prisoner on an indictment for larceny, the evidence taken before the committing magistrate cannot be legally introduced.—*Oliver* v. *State*, 157.

12. On the trial of an indictment for selling liquor to a slave, the statement of one present at the sale, "that the defendant did let the negro man have the whisky," although made in the presence of the defendant, is not competent evidence, and being admitted, should have been excluded by the court from the jury.—*Noonan* v. *State*, 212.

13. Under the plea of *autrefois acquit* or *convict*, the evidence is not necessarily and exclusively of record, but may be by parol, to the extent demanded by the circumstances of the case.—*Noonan* v. *State*, 212.

14. Intoxication may be a circumstance proper for the consideration of the jury upon the question of intention or malice on the part of the offender, but it is no legal excuse or extenuation of the crime.—*Kelly and Little* v. *State*, 235.

15. Where a justice of the peace, upon a preliminary examination of the accused before him, took down in writing, his confessions made at the time, it is error to permit him, upon the final trial of the accused, to testify from his recollection, in relation to such confessions; the production of such written statements being unaccounted for.—*Peter* v. *State*, 249.

16. The general rule of law is, that confessions when made under the influence of a sufficient threat, or of a sufficient promise, are not admissible as evidence. Subsequent confessions, however, are admissible, if made under such circumstances as create a reasonable presumption that the threat or promise had ceased to have any influence upon the mind of the accused.—*Ib.*

17. The presumption of law is, that the influence of a threat or promise, once made, continues to operate; this presumption may be rebutted by other proofs, showing that it had ceased to operate.—*Ib.*

18. Where a slave, who had been charged with crime, and was threatened by a party armed with guns, that if he did not confess he would be hanged, did therefore confess his guilt; and shortly afterwards was taken before a magistrate, accompanied by some of these same persons, and was interrogated by the magistrate as to his guilt, without being previously cautioned by the magistrate of the effect of his replies, and he again made confessions of his guilt; *held*, that the last confessions of the accused were not properly admissible as evidence against him.—*Ib.*

19. If one lose his goods and another find them and convert them to his own use, not knowing the owner, it is not larceny; but if the finder knew the owner, or had the means of knowing him, it would be larceny.—*Randall* v. *State*, 254.

20. Under the laws of this state, a negro *prima facie* is presumed to be a slave; and if he be found in the possession of one other than his owner, under suspicious circumstances, it will be sufficient to put such person upon the explanation of the circumstance of his possession. And it is the duty of every citizen who finds a slave at large, without a permit from his owner, to deliver him to the nearest justice of the peace for commitment.—*Ib.*

21. Randall was indicted for stealing the slave of Bridges. It was proved that the slave ran away, and was absent five months, when he was found in the woods; that during this absence, Randall was seen traveling along the road with a negro very much

resembling the slave of Bridges, and whom the witness believed to be the slave of Bridges, though he was not sure. Witness did not know the slave, and had only seen him once. Randall, when seen with the slave, was going in the direction of Bridges's residence. *Held*, that the evidence was not sufficient to warrant a verdict of guilty, nor to put the defendant on proof in explanation, and that a new trial should have been granted.—*Ib.*

22. Where, it being in evidence that the deceased came to his death by means of the discharge, by the accused, of a shot-gun loaded with duck-shot, the court was asked to charge the jury, "That if they believed, from the evidence, that the deceased came to his death by means of the shot aforesaid, and not by one leaden bullet discharged from said shot-gun, as alleged in the bill of indictment, they must find for the accused," and the court refused to give said charge, but did charge the jury, "That the said proof was sufficient to sustain the said bill as alleged in said indictment," the court properly refused to give said charge, and was clearly justified in the one which was given, as it referred solely to the proofs of the contents of the shot-gun, and was not intended as a charge generally upon the evidence.—*Goodwyn* v. *State*, 257.

23. On the trial of a party indicted for the forgery of auditor's warrants, the prosecution will not be allowed to prove, with a view of showing that they are bills of credit, that at the time they were issued, there was no money in the treasury to pay them, that warrants were not then redeemed, were under par, and circulated from hand to hand as money.—*Pugaud* v. *State*, 278.

24. On the trial of the accused for forgery of auditor's warrants, besides the proof of the handwriting of the accused, there being no positive proof of the forged warrant having been seen in the possession of or uttered by the prisoner; the state proved that he was the clerk of the auditor, had official custody of his books, free access at all times to the registry, and that the forged warrants, in all material respects, corresponded with the genuine ones in the register; whereupon the prisoner proposed to prove that the registry was not always, or generally, in his custody, but was carelessly thrown about the office, accessible to all who might casually enter it, and often with auditor's office itself, for a considerable time, in the care of a single servant; *held*, that the testimony offered by the accused was proper rebutting testimony, and should have been admitted.—*Ib.*

25. D. being indicted for the murder of a slave, and it being proved that D. was acting in the capacity of overseer for B., a witness on the part of the state was permitted, although objected to by the prisoner's counsel, to testify as to the prisoner's general habit, as overseer, in punishing slaves upon the plantation of the owner of the slave killed; *held*, by the court, that such evidence was inadmissible, being calculated to prejudice the jury against the prisoner, and not being responsive to any charge in the indictment.—*Dowling* v. *State*, 280.

26. The substitution of depositions for oral testimony belongs to civil proceedings. In no state of circumstances under our constitution can the deposition of a witness be used against the defendant in a criminal prosecution; and the same rule holds as to the deposition of a witness in his favor, unless by his consent; and therefore, where a defendant makes an affidavit for a continuance, on account of the absence of witnesses, setting forth what they will prove when present, the state cannot force him into a trial by admitting the truth of what the absent witness would testify.—*Dunnigan* v. *State*, 302.

27. On the trial of a prisoner for a rape upon his ward, the entire record of his proceedings, as guardian, in the probate court, including his accounts and settlements and appropriations of the ward's property, is evidence to establish the continuing guardianship of the prisoner over the ward; and if the prisoner desire to exclude any portion of the record as irrelevant, he should move to exclude the irrelevant part, and not the whole record; in default of which the admission of the whole record will not be error, though the prisoner except to it at the time. Chief Justice Sharkey dissenting, and holding that the whole record was inadmissible, as calculated to prejudice the jury against the prisoner, inasmuch as it showed that he had squandered the property of his ward, besides having despoiled her of her virginity.—*Turney* v. *State*, 305.

28. The prisoner was on trial for a rape, and a witness was asked if he had not at a certain time authorized his wife to offer the victim of the outrage a home, and in what manner he had authorized it; and the record, without setting forth the answer of the witness, stated in general terms that he answered the question in the affirmative, and stated the reasons which he had stated to his wife; it was held that, the record not disclosing what the testimony was which the witness gave, the court could not determine as to its legality. Chief Justice Sharkey dissenting, and holding that, let the testimony be what it might, it was inadmissible, being a conversation between a man and his wife, not in the presence of the prisoner, and forming no part of the *res gestæ*.—*Ib.*

29. The dying declarations of one who has been killed, are admissible in evidence against the slayer, notwithstanding the constitutional provision that the accused "shall be confronted with the witnesses against him;" their admissibility is confined to cases of homicide only.—*McDaniel* v. *State*, 386.

30. It is essential to the admissibility of dying declarations, and it is preliminary to be proved by the party offering them in evidence, that *they were made under a sense of impending death*; but it is not necessary that they should be stated at the time, to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be proved directly by the expressed language of the deceased, or be inferred from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case.—*Ib.*

31. Dying declarations under the following circumstances were admitted in evidence: On the day the mortal stroke was given, the witness told the deceased that he thought his deposition ought to be taken, as, in the opinion of the witness, he must inevitably die before morning; the deceased replied he thought so too; and afterwards exclaimed, "O Lord! I shall die soon." His declarations were reduced to writing, and read over to him twice, and signed by him. The attending physician on the evening previous, had held out to the deceased some hope of recovery, but told him his chance was bad. Deceased lived some ten days after making the declaration.—*Ib.*

32. On the trial of a prisoner for murder, where the fact of the killing by the prisoner has been clearly proved, evidence as to the character of the prisoner for peace or violence, is inadmissible; but if the guilt of the prisoner be doubtful, such testimony is admissible, and is not confined to the general character of the prisoner, but must have reference to the nature of the charge against him; but rebutting testimony as to character may be introduced by the prosecutor, and the presumption arising from such evidence of general character is of little weight.—*Ib.*

33. A record is conclusive evidence; but what is, or what is not a record, is matter of evidence, and may be proved like other facts.—*Rawls* v. *State*, 368.

34. Declarations are admitted in evidence as part of the *res gestæ* only upon the presumption that they elucidate the facts with which they are connected, having been made without premeditation or artifice, and without a view to the consequences.—*Scaggs* v. *State*, 384.

35. Evidence of a supposed attempt, by the defendant, three years previous to the trial and the finding of the indictment, to utter forged bank notes, is illegal evidence on the trial of an indictment for a similar offence.—*Morris* v. *State*, 387.

36. Two considerations unite in the admission of dying declarations: The necessity of the case, and the situation of the declarant. The danger of impending death is an equivalent to the sanction of an oath. And the same rules apply, in these cases, to slaves as to white persons.—*Lewis* v. *State*, 392.

37. The presumption of law is in favor of the proper religious culture in slaves, and their belief in revelation and a future state of rewards and punishments; and unless the contrary is shown the declarant will be presumed to have had such belief.—*Ib.*

38. It must be established as a previous fact, before dying declarations can be admitted, that the declarant was sensible of his approaching dissolution.—*Ib.*

39. The fact that the deceased, after the wound was inflicted, cried, "Oh my people!" does not indicate the apprehension of approaching death.—*Ib.*

40. It is the belief of the declarant that his wound is mortal, and of his future accountability, that renders the declarations admissible.—*Ib.*

41. The record of the conviction of the principal is evidence against the accessory. It is competent to prove the conviction of the principal and all its legal consequences; but not evidence of the fact of the guilt of the accessory.—*Keithler* v. *State*, 403.

42. The testimony of an accomplice should be received with great caution by the jury, but it is impossible to say that he should not be believed. The jury are to determine his credibility from his manner and other surrounding circumstances.—*Ib.*

43. A voluntary confession of an accomplice is entitled to little weight; and if a different statement be made afterwards, under oath, when circumstances have changed his condition, it will be for the jury to say whether they will disbelieve him on account of such discrepancy.—*Ib.*

44. When an accomplice is under sentence of death, without hope of pardon, it will be supposed that all motive to falsehood had ceased to exist.—*Ib.*

45. Evidence of a single witness, that the defendant was seen with a knife in his hand, in pursuit of a slave, when he was stopped by the witness, and that he made threats against the life of the slave, is insufficient to warrant a conviction for an assault with intent to kill.—*Bradley* v. *State*, 416.

46. Where a bet is made on the result of a presidential election, it is competent to establish the result of the election by parol testimony.—*Williams* v. *State*, 422.

47. In legal acceptation, United States treasury notes are not money, and if the indictment charge the bet to have been made with them as valuable things, their value must be proved to warrant a conviction.—*Ib.*

48. The legal test of the sufficiency of evidence to authorize a conviction, is its sufficiency to satisfy the understanding and conscience of the jury; and a juror ought not to convict unless the evidence excludes from his mind all reasonable doubt of the guilt of the accused.—*Cicely* v. *State*, 435.

49. As an abstract proposition, the force of circumstantial evidence to warrant a conviction, ought in no case to be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence. And the direct testimony of a single witness ought not to authorize a conviction, unless it were in itself sufficient to exclude from the mind of the jury every reasonable doubt of the guilt of the accused.—*Ib.*

50. The general rule is, that no words of reproach, or provoking or insulting language, or actions short of an assault, will furnish excuse for a homicide, even when committed at the time of the killing.—*Jolly* v. *State*, 450.

51. When the manner of the homicide is not fully shown, a known character for violence of temper and dangerous desperation in the deceased may serve to raise presumption in favor of the prisoner. But the general character for insolence cannot furnish an excuse.—*Ib.*

52. It is a universal principle of evidence, that a man shall be understood to intend that which he does, or which are the natural consequences of his acts.—*Morgan* v. *State*, 452.

53. Where a general felonious intention is sufficient to constitute the offense, it is no ground of excuse where a party who intended to commit one felony has committed another.—*Ib.*

54. The specific intention of killing the particular person alleged to have been shot at, is an essential ingredient of the offense charged in the indictment, and proof of a general felonious or malicious intention is not sufficient. It is incumbent on the state to prove the specific intent charged.—*Ib.*

55. A slave who has absconded from the possession of his owner is nevertheless in his constructive possession; and the master might maintain trespass for any injury done to the slave during the period of his absconding.—*Coon* v. *State*, 455.

56. If a person lose his goods and another finds them, and converts them to his own

use, not knowing the owner, it is no larceny; but if he knew the owner, or had the means of knowing him, it would be larceny.—*Ib.*

57. A negro, by the laws of this state, is *prima facie* a slave. If a person, therefore, who is not the owner, take a runaway negro into his possession, with intent to feloniously convert him to his own use, knowing or having the means of knowing the owner, it is larceny.—*Ib.*

58. Statements or confessions must be delivered to the jury precisely as they were made; certain facts cannot be detailed to the jury and others withheld. It is for the jury to give such weight to the whole as in their opinion it merits; but they may believe one part and wholly disregard the rest.—*Ib.*

59. The proof of the *venue* must be established to warrant a conviction; but, like other facts, it may be proved by circumstances. Where, therefore, from all the circumstances established in the case, the jury found that the *venue* was correctly laid, it is sufficient, and their verdict cannot be set aside on that account.—*Ib.*

60. The essential ingredient of the offense of selling liquor to a slave consists in the want of the permission of the master, and such want of permission must be proven to warrant a conviction.—*McGuire* v. *State*, 462.

61. The material allegations of the indictment, or those which charge the facts constituting the offense alleged, must in every case be sustained by sufficient proof.—*Ib.*

62. There is a plain distinction between express and implied malice; the one is characterized by a sedate, deliberate intention and formed design, evidenced by external circumstances; the other is the offspring of sudden impulse.—*Anthony* v. *State*, 467.

63. The evidence and the verdict must both be confined to the charge in the indictment, otherwise the adminstration of the law becomes uncertain, and the prisoner is deprived of the protection which a knowledge of the precise charge is calculated to throw around him.

64. If, from the evidence, the jury should be of opinion that permission is given to a slave, by the master, mistress, owner, or overseer, to buy liquor, then the offense is not committed, though the permission is given to the slave and not to the sellers. But if they should be of opinion that permission was not given to buy, but that the slave was sent to ascertain and fix the fact that the defendant would sell without permission, and the sale took place under these circumstances, then the offense is consummated.—*Bond* v. *State*, 469.

65. An employer's delivery of an article to a slave, and afterwards standing by to detect the offender who may trade with the slave, does not legalise the trading.—*Ib.*

66. The time for the presidential election is fixed by law, and is therefore sufficiently certain, and need not be averred in the indictment.—*Cain* v. *State*, 481.

67. Where the parties agreed that a present of a coat should be made to the defendant in the event of a certain result of the election, but if otherwise, the defendant was to make a present of a coat to the other party, and it was in proof that the election was held and the bet paid in money, it was a mere evasion, and is sufficient to justify a verdict of guilty against the defendant.—*Ib.*

68. Circumstantial evidence has been received in every age of the common law, and it may rise so high in the scale of belief as to generate full conviction. When after due caution this result is reached, the law authorizes its ministers to act upon it.—*McCann* v. *State*, 486.

69. What circumstances will amount to proof, can never be matter of general definition; the legal test is the sufficiency of evidence to satisfy the understanding and conscience of the jury. It is sufficient if they produce moral certainty, to the exclusion of every doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature.—*Ib.*

70. In cases depending upon circumstantial evidence, a number of links often concur in forming the chain. It cannot be said what bounds are to circumscribe the inquiry. All which may tend to elucidate the transaction should be admitted.—*Ib.*

71. A jury may believe that part of a confession which charges the prisoner, and reject that part which is in his favor, if they see sufficient grounds for so doing.—*Ib.*

72. The union and concurrence of various detached circumstances may produce full conviction, when either of them standing alone might leave room for much doubt.—*Ib.*

73. An examination before the magistrate on trial of *habeas corpus* cannot be read for the purpose of discrediting a witness, unless it be read over to and signed or approved by the witness at the time it was made.—*Nelms* v. *State*, 509.

74. Where a conversation was had with the deceased previous to his dying declarations, on the subject of the transaction which caused his death, it is important that such conversation should be made known to the jury, to show that it varied from the dying declarations; and it is error to exclude it.—*Ib.*

75. On trial of the indictment for giving false testimony as a witness, an affidavit of the accused is not admissible as evidence. In such case, the accused should have been indicted for the perjury of making a false affidavit.—*Copeland* v. *State*, 527.

76. The guilt or innocence of the accused is in no degree dependent upon the question of his or the deceased's title to the land or fence, which had caused the dispute between them and ended in the killing of deceased. If either killed the other with a deadly weapon in order to prevent a trespass in the removal of the fence, such homicide would be murder in the absence of proof that would tend to rebut the presumption of malice arising from the weapon used.—*Lambeth* v. *State*, 532.

77. The competency of dying declarations is exclusively for the consideration of the court, and having once decided on its competency, it then becomes the province of the jury to decide upon its credibility, who are at liberty, in doing so, to consider all the circumstances under which they were made, and give to the evidence only such merit as they may think it deserves.—*Ib.*

78. Where the court has admitted the dying declarations as competent evidence for the jury, the law raises a presumption that they were made by the party under a due sense of impending dissolution.—*Ib.*

79. Objections to the admission of dying declarations must be made on the trial; it is too late to object on error.—*Ib.*

80. The Bill of Rights, which declares that "the accused shall be confronted by the witnesses against him," does not apply to the admission of the dying declarations of the deceased, in cases of homicide.—*Ib.*

81. Dying declarations are not entitled to the same degree of credibility, as if the deceased had sworn to the same facts in open court, as a witness; and an instruction to that effect is erroneous.—*Ib.*

82. Upon cross-examination of a witness, greater latitude is allowed than on an examination in chief, and leading questions are admissible.—*Boles* v. *State*, 593.

83. In an attempt to impeach the judgment of the circuit court, the record should distinctly show the facts upon which the charge of error is predicated, otherwise the action of the court will be presumed to be strictly in accordance with law.—*Ib.*

84. The answer of the accused to a question asked subsequent to the commission of the offense, is no part of the *res gestæ*, and was properly excluded from the jury.—*Ib.*

85. When the accused has been indicted, tried, convicted, and sentenced in one county, and upon a reversal of the judgment has obtained a change of venue to another county, and is put upon his trial there, it is error to allow the affidavit upon which the venue has been changed, or the record of the former trial and conviction, to be read in evidence to the jury.—*Ib.*

86. Where confessions were made on one day, under the influence of fear from previous whipping, and a threat of further punishment, and were repeated the day following to another person (the master of the accused), such repeated confessions are properly presumed to have been made under the same fear and apprehension, and ought not to be given in evidence on the trial.—*Van Buren* v. *State*, 604.

87. In the case of Peter (a slave) v. The State, cited by the court, they say, "that after the fact is known, that either the influence of hope or fear existed, superinducing the confessions, explicit warning should be given to the prisoner of the consequences of a confession, and it should be likewise manifest that the prisoner understood such warning, before his subsequent confessions could be given in evidence.—*Ib.*

88. The misconduct of a witness for the state in answering an illegal question, put by the state, after it had been objected to by the accused, when the answer is promptly ruled out by the court, is no ground for a new trial; unless it were distinctly shown that the answer thus made had a sinister influence on the verdict of the jury.—*Sartorious* v. *State*, 624.

89. Witnesses who have been ordered by the court to withdraw from the court-room during the examination of witnesses, but who still continued present and heard the examination, will not ordinarily be examined. But it rests in the sound discretion of the judge whether they shall be examined or not. The safest rule seems to be not to reject such evidence altogether, but to admit it, subject to such remarks as the circumstances may warrant.—*Ib.*

90. The party examining a witness in chief should interrogate him as to all material matters in the first instance; if he omits a material question it cannot be put on examination in reply. New questions unconnected with the subject of the cross-examination, or which do not tend to explain it, cannot be put in reply. Such is the general rule, but it rests in the sound discretion of the court to determine whether the facts of a particular case, do or do not warrant a departure from it. This court will interfere with the exercise of this discretion, only in cases where the injury arising from a departure from the rule is manifest and great.—*Ib.*

91. On a trial for receiving goods, knowing them to be stolen, it is error to charge the jury "that the discovery of the goods in the possession of the defendant (they having been proved to be stolen), shortly after they were missed, and the denial by the defendant that he had any such goods in his possession, is presumptive evidence that he received them, knowing them to be stolen." It assumes as a fact proved, that the goods alleged to have been bought by the prisoner, were stolen. It was, in effect, a charge upon the weight of testimony. Besides, the presumption arising from the facts would be that the accused had stolen the goods himself, and not that he had received them knowing they had been stolen.—*Ib.*

92. It was error to charge the jury that "if they believed from the evidence, that the articles were purchased under their value, it is a presumption of the guilty knowledge of the defendant." The rule embraced in this instruction is too broad and comprehensive, and is indefensible upon reason or authority.—*Ib.*

93. The denial of a party, having in his possession stolen goods, that he has such goods in his possession, is presumptive proof of his guilty knowledge; but if it be shown that such denial of possession was the consequence of misunderstandings, such denial ceases to raise a presumption of guilt.—*Ib.*

94. A high degree of sudden and resentful feeling will not alone palliate an act of homicide committed under its influence. It is essential that the excited and angry condition of the party committing the act, which would entitle him to a milder consideration of the law, should be superinduced by some insult, provocation, or injury, which would instantly produce in the minds of ordinary men the highest degree of exasperation.—*Preston* v. *State*, 650.

95. While circumstantial evidence is in its nature capable of producing the highest degree of moral certainty, yet experience proves that it is a species of evidence, in the application of which the utmost caution and vigilance should be used.—*Alghert* v. *State*, 658.

96. It is the exclusion of every other hypothesis, which invests mere circumstances with the force of truth. Whenever the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be.—*Ib.*

97. A leading question is one which directly suggests the answer which is desired, or which embodies a material fact and admits of an answer by a simple negative or affirmative, though neither be directly suggested. But if the object of the question is to direct the mind of the witness to what is material, and if it relate to matter merely

introductory, it should not be objected to although in form it be leading.—*Stringfellow* v. *State*, 691.

98. The prisoner's confession, when the *corpus delicti* is not proved *aliunde*, is insufficient to warrant a conviction.—*Ib.*—*Pitts* v. *State*.

99. No definite length of time after loss of goods and before possession shown in the accused, seems to be settled, as raising a presumption of guilt. Where the goods are bulky, or inconvenient of transmission, a greater lapse of time is allowed to raise the presumption of guilt, than if they were light and easily conveyed.—*Jones* v. *State*, 702.

100. In prosecution for larceny of a saddle or the like, after the lapse of nearly a year, the mere fact that the chattels were found in the possession of the accused, creates no presumption of guilt, and such possession without evidence *aliunde* to establish the charge is not sufficient to put the accused on his defense.—*Ib.*

101. If evidence is proposed which of itself appears irrelevant to the issue on trial, and is objected to, the party offering it is bound to show its relevancy, either by explanation to the court as to its bearing on the case, or by introducing other evidence connecting it with the *res gestæ*, and opening the door to its admission.—*Dyson* v. *State*, 710.

102. Bare fear of danger or great bodily harm, unaccompanied by any overt act indicating a present intention to kill or injure, will not warrant a person in killing another. There must be actual danger at the time. There must be an overt act on the part of the deceased to carry out his threats to warrant his killing, or the danger of such design must be imminent, pressing, and unavoidable.—*Ib.*

103. The acts of public officers, especially judicial tribunals acting within their jurisdiction, are valid, and done rightly until the contrary is proven.—*Ib.*

104. The jury was instructed that "if the slave came out with spirituous liquor which he did not take into defendant's house, the defendant's knowledge is presumed; *Held*, that the instruction was correct.—*Murphy* v. *State*, 765.

105. Every homicide is presumed to be murder, until the contrary appears from facts or circumstances proved. Malice is implied from the nature and character of weapon used.—*Green* v. *State*, 788.

106. If a party enter into a conflict with a deadly weapon, not intending to use it, but only resort to it in the heat of conflict, and death ensue, the offense is manslaughter. But if he intends from the first to use it, if necessary, to overcome his adversary, and do use it, and kill his adversary, it is murder. And this, although the slayer habitually carried the weapon.—*Ib.*

107. In order to render the confessions of a prisoner competent evidence against him, it is not necessary to inform him of his rights, or that he is not bound to confess. All that is necessary is that they must be free from compulsion.—*Dick et al.* v. *State*, 811.

108. It is too late, after a confession has gone to the jury without objection, for the prisoner to object and move for its exclusion.—*Ib.*

109. A party may be convicted of a crime upon the testimony of his accomplice. His connection with the crime goes to his credibility, but does not affect his competency, and the jury are the exclusive judges as to the degree of weight that his testimony is entitled to.—*Ib.*

110. Instructions given to the jury as follows:

1. The law presumes every man to be sane, until the contrary is proven.
2. That if the jury believe, from the evidence, that the accused killed the deceased with malice, and not in necessary self-defense, he is guilty of murder, notwithstanding they may believe he was, at the time of committing the deed, laboring under partial insanity, unless he was, from such insanity, incapable of understanding the nature and consequence of his act, and of knowing that it was wrong, and that he would be punished for it.
3. That insanity, however produced, constitutes no excuse for crime, unless it be so great as to deprive the party of his power to understand the nature of his act, or

of his ability to distinguish between right and wrong, and of his ability to understand that he will be liable to punishment if he commits it.—

4. That though a party be partially insane, yet he is responsible for his criminal acts, unless it appear that he was prompted or instigated by his madness to perpetrate such act.—

5. That if the homicide charged is proven, in the opinion of the jury, the barbarity of the act affords no legal presumption of insanity in the accused. *Held:* That these instructions correctly expounded the law in regard to insanity, as a defense for crime.—*Bovard* v. *State*, 818.

111. Homicide is justifiable where the accused had a reasonable ground to apprehend a design to commit a felony, or do some great personal injury to his wife, and there is imminent danger of the design being accomplished.—*Staten* v. *State*, 834.

112. Where a witness for the state was allowed to testify that the accused had confessed to him that he was guilty of the offense charged against him, and that he had heard him soon afterwards, on the same evening, make other confessions to other persons, the accused has a clear right to cross-examine the witness on that subject, such examination being material to the issue to be tried by the jury.—*Dick* v. *State*, 842.

113. The confessions of a slave made to his master are not privileged communications, and are properly admissible in evidence against him, if made freely and voluntarily, and without any undue influence being exerted to obtain them.—*Sam* v *State*, 1037.

114. The master, after the arrest of the slave, chained him; and whilst they were together alone, he asked the slave why he had burned the gin-house—assuming, in the form in which he put the question, that the slave was guilty, but used no force to extort the confession; whereupon the slave confessed the burning, and said that he had committed the crime because he wished to be hung. *Held:* That the means used to obtain the confession were not improper, and the confession was properly admitted as evidence.—*Ib.*

115. The statements of a physician, who examined the wounds of the deceased, immediately after they were inflicted, although not an eye-witness of the affray—that the wounds were given in the proper county—and the description of, and reference (by other witnesses) to various localities at and near the scene of killing, which were probably familiar to the jury, are sufficient proof of the venue, particularly when no objection is raised on this account at the trial.—*Riggs* v. *State*, 846.

116. Express malice is evidenced by a previous threat or former grudge; and it is for the jury to determine whether the threat or grudge is established. If the threat be proved satisfactorily to have been made, and afterwards carried into execution, it will be presumed to have been done with a malicious intent, and it is incumbent on the accused to show circumstances giving it a different character.—*Ib.*

117. Where express malice is shown, and the person against whom the threat or other evidence of malice was made or existed, be afterwards killed with a deadly weapon, by the person harboring the malicious purpose, no mere provocation at the time of committing the act will relieve it of the character of malicious killing, but it is presumed to be in consequence of the previous threat or grudge.—*Ib.*

118. Where a witness is impeached only by one other witness, and such impeaching witness is afterwards contradicted by another witness, it is the peculiar province of the jury to judge which of them are entitled to credit.—*Ib.*

119. The possession of property recently stolen will create a presumption that the possessor is a thief; but this is a mere presumption, and the true state of the case may be entirely different, and the party may be enabled to show his innocence by positive testimony.—*Jones* v. *State*, 858.

120. The possession of stolen goods must be accounted for; but as this cannot always be done by legal evidence, owing to the nature of the goods and the circumstances of the case, it is a matter of no little weight that the conduct of the accused is consistent with the account he gives of his acquisition of their possession.—*Ib.*

121. The fact that he makes no attempt at concealment, but openly exposes the goods where they are subject to be recognized by the owner or others interested, are circum-

stances that strongly tend to destroy the presumption arising from such recent possession.—*Ib.*

122. When the accused gives a reasonable account of his possession of stolen property, it lies on the prosecutor to show that it is false; but if it is unreasonable or improbable on its face, the accused must prove its truth.—*Ib.*

123. Before the statements of co-defendants can be given in evidence against each other respectively, there must be a *prima facie* case established by evidence *aliunde*.—*Browning* v. *State*, 360.

124. If the combination for illegal purposes be once established, then the acts and words of every person party to such combination, and in furtherance of the common design, is the act of all, and all are alike responsible.—*Ib.*

125. Reasonable doubt is not probability only, or conjecture or supposition; the doubt which should induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the testimony before them.—*Ib.*

126. Express malice is, when one, with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention, as laying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.—*Wray ex parte*, 875.

127. The declarations of a prisoner, made when he obtained weapons for an anticipated difficulty, that he did not intend to use them unless other parties interfered, and the fact that he did not use them until closely pressed by his antagonist and violently beaten, are sufficient to disprove express malice. HANDY, J., *dissented*.—*Ib.*

128. When a well-founded doubt can be entertained as to the guilt of the prisoner, the proof is not evident nor the presumption great. HANDY, J., *dissented*.—*Ib.*

129. To judge of the weight of circumstantial evidence, is peculiarly within the province of the jury, and, therefore, a verdict on such evidence, unless it is opposed by a preponderance of testimony, or palpably without evidence to support it, will always stand. As to the case at bar, SMITH, C. J., *dissented*.—*Browning* v. *State*, 391.

130. The declarations of a messenger sent by the prisoner to a third party, if made with reference to the object of his visit, are admissible in evidence against the prisoner, if it be shown that they were made by his authority. SMITH, C. J., *dissented*.—*Ib.*

131. The admission of improper evidence when the defendant sustains no injury thereby, is no ground of error, or for setting aside the verdict. SMITH, C. J., *dissented*.—*Ib.*

132. The declarations of a party, the place of whose domicile is in issue, are competent but not conclusive evidence of the *animo manendi*, or *animo revertendi*, with which he had left the state.—*Beason* v. *State*, 1075.

133. The rule of evidence is, that when a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in showing it, the presumption of innocence or of acting according to law does not render it incumbent on the other side to prove a negative.—*Easterling* v. *State*, 1086.

134. The possession of recently stolen goods, if unexplained, is presumptive evidence of guilty; and what facts or circumstances are sufficient to explain such possession is, for the most part, to be determined by the jury.—*Belote* v. *State*, 1120.

135. Testimony, to give which any force against the accused, the jury would have to indulge unwarrantable conjectures to his prejudice, is irrelevant and not admissible.—*Ib.*

136. Though confessions improperly obtained from accused are not admissible, discoveries made and acts done in consequence of such confession, and in corroboration thereof, are admissible. And whether such confession, so corroborated, may not also be admitted on account of the corroboration, *quære*.—*Ib.*

137. By means of a confession improperly obtained, property alleged to have been recently stolen was found and identified; *held*, that the finding was admissible in evidence against the accused, whether the confession was or not.—*Ib.*

138. Where a person prepares and conceals a deadly weapon, before entering into a fight which he provoked, with the determination of using it, if necessary, in the fight, it is evidence of malice, which, if he kill his antagonist, would constitute murder.—*Price* v. *State*, 1168.

139. "If a party enters into a contest dangerously armed, and fights under an undue advantage, though mutual blows pass, and kills his adversary, it is not manslaughter but murder."—*Ib.*

140. Where a bill of sale has been procured by false and fraudulent misrepresentations, without any consideration, from a weak-minded old woman, who was under the care and protection of the defendant, it is competent evidence to establish the defendant's original intention.—*Watson* v. *State*, 1184.

141. A person leaving this state with the felonious intention of stealing slaves in another state, and bringing them into this state, and here converting them to his own use, and who carries that design into execution, is guilty of larceny, and may be indicted in this state for such.—*Ib.*

142. The legal possession of goods stolen continues in the true owner; and every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation, which may be the subject of indictment in every state to which the goods are removed.—*Ib.*

143. A verdict of guilty will be set aside if it appear that illegal evidence was admitted, which *might* have operated to the prejudice of accused; but *aliter*, when it is manifest that the illegal evidence could not have influenced the verdict.—*Lynes* v. *State*, 1208.

144. The statements of one or more conspirators are admissible against the others if made in the progress or in prosecution of the common design; provided, however, that the conspiracy be first established by proof *aliunde*.—*Ib.*

145. The rules respecting confessions improperly obtained, considered.—*Ib.*

146. A confession by a prisoner to his jailor, on several occasions, is admissible as evidence against him, although before his confinement he had been induced to make the confession by undue influence.—*Simon* v. *State*, 1226.

147. A confession is not admissible in evidence unless it is made freely and voluntarily, without restraint, and without hope of reward or fear of punishment.—*Ib.*, 1229.

148. Confessions made after very slight expressions, calculated to convey to the mind of the party confessing that he would obtain any benefit if he would confess, is inadmissible; and this rule applies in cases of the confessions of the guilt of others as well as of the guilt of the person confessing.—*Ib.*

149. A confession made on the same day, and a few hours after a prior confession had been made under a threat or promise, and in the presence of some of the same persons to whom the first confession was made, and without any caution having been given to the prisoner, is presumed to have been made under the influence of the threat or promise before made, and is not admissible in evidence.—*Ib.*

150. The prisoner, who was a runaway slave, was caught and severely bitten by dogs. He was not suspected of the murder, and being asked by a white person why he ran away, he refused to answer; whereupon he was struck down, and warned that if he did not talk, he would be knocked down again. The prisoner was asked by the same person "what he knew about Hiram's killing Norvell," adding at the same time, that "it would be better to tell all about it." The prisoner then stated that Hiram did not kill the deceased, but he, the prisoner, did it. *Held*, that the confession was not voluntary, and therefore inadmissible.—*Ib.*

151. Where a slave confessed to a stranger in the absence of his master, and afterwards confessed to his master, and giving his reasons for committing the deed, the introduction of the first confession against the slave did not authorize him to introduce in his own favor the second confession.—*Alfred* v. *State*, 1235.

152. A slave, indicted for the murder of his overseer, cannot introduce as evidence in his defense that the deceased a few hours before the killing had forced the prisoner's wife to submit to sexual intercourse with him, and that this had been communicated to the prisoner before the killing.—*Ib.*

153. In presumption of law, a person, in the absence of proof to the contrary, will be held to have intended the natural and probable consequences of every act deliberately done by him. But this presumption is only *prima facie* evidence of such intention. The jury should be left free to consider whether the testimony offered by the accused

180. Where there is no evidence tending to connect another party with the killing, and no fact going to show that such person had an opportunity to commit the act, testimony that such other person had made statements in relation to a previous poisoning, and her intention to commit the crime again, is clearly irrelevant, and should not be admitted. So also is a proposed examination of a witness as to his having had sexual intercourse with such other person.—*Ib.*

181. On the trial of a slave for poisoning one of her master's family, it is competent for her to prove, in regard to the question of intent, that her master had been in the habit of sexual intercourse with her.—*Ib.*

182. Statements made by the prisoner on the trial of another person charged with the same offense as himself, for which he is indicted, is not admissible in evidence against him.—*Ib.*

183. The fact that another slave was being whipped in the hearing of the accused "in relation to matters connected with the offense with which the accused is charged," does not make a confession, soon afterwards made by the accused, otherwise than free and voluntary, where it does not appear that the whipping of the other slave was done for the purpose of coercing any confession or discovery from him in relation to the crime charged against the accused, and it is not shown that the whipping could have had any influence on the accused to cause him to make a confession.—*Frank* v. *State*, 1474.

184. Anything reasonably tending to hold out the hope or promise of reward or benefit for confession, or fear of punishment or injury for the failure to confess, is an unwarrantable inducement, which renders the confession so obtained incompetent evidence. But it is not every inducement that will render a confession inadmissible. An appeal to the character and circumstances of the party—to his responsibility to a tribunal above all earthly courts—to his situation and circumstances, might be an inducement to confess; yet such inducements would not render the confession inadmissible. Hence, an instruction which directed the jury to disregard the confession of the accused, if it were made under "any inducement whatever," is erroneous, and should not be given.—*Ib.*

185. Though the finding of stolen goods in the possession of the accused, or their discovery at a place where they have been hid in consequence of information derived from him, is generally presumptive evidence of larceny only by the accused, yet if a burglary be proven to have been committed, and the accused makes a circumstantial confession of his entry of the house and taking of the goods, and then discovers the place of their concealment, in accordance with which they were found, such disclosure and finding are presumptive evidence that the accused committed the burglary.—*Ib.*

186. The raising of a window-sash which was down, and which was the only obstacle to ingress through the window, and the entry of the accused through the same, is a sufficient breaking in law to constitute burglary.—*Ib.*

187. A new trial will not be granted for newly-discovered evidence when it appears from the affidavits read in support of it that the party asking the new trial must necessarily have been aware of the evidence when the trial was had.—*Ib.*

188. The admission of improper testimony, when no objection is made to it at the time, is no ground of error.—*Hogsett* v. *State*, 1505.

189. When the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is to be taken as true, unless disproved by that party.—*Bowler* v. *State*, 1515.

190. That which amounts to mere possibility only, or to conjecture or supposition, is not what is meant by reasonable doubt. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the evidence before them.—*Ib.*

191. It is well-settled law that before the acts and declarations of one party can be received in evidence against another, in a criminal prosecution, there must be proof of a conspiracy, *aliunde*. The words themselves do not prove the confederacy or tend to prove it; and, therefore, such declarations are mere hearsay. But it is quite as well

settled by authority that a "conspiracy may be proved, like other controverted facts, by the acts of parties or by circumstances, as well as their agreement."—*Street* v. *State*, 1591.

192. The rule as to the admission of confessions as evidence is, that they must be voluntary and free; not induced by the expectation of any advantage held out or promised, nor extorted to escape harm or injury, present and imminent, or threatened. Confessions must not proceed from a mind influenced to make them by the hope of a reward or benefit offered, or by the fear of injury or punishment threatened. Some extraneous pressure in the one direction or the other must be proved, in order to show that the confessions are not voluntary. Whether the confessions in a particular case ought or ought not to be received in evidence, depends very much on the special circumstances of that case.—*Cody* v. *State*, 1678.

193. Where the confessions have been induced by a promise or by a threat, similar admissions subsequently made will be presumed to have been made under the same motive, unless all the facts accompanying it remove such presumption, and create the belief that such motive had ceased to have influence on the mind.—*Ib.*

194. Anything reasonably tending to hold out the hope or promise of reward or benefit for confession; or tending to create a fear of punishment or injury for the failure to confess, is, in law, an unwarrantable inducement to confess. But an appeal to the character or circumstances of the party, such as his family, his situation in life, the claims of justice of others whose rights or safety may be involved in his declaring the truth, to his responsibility to the Almighty for falsification or suppression of the truth; these might be inducements to make a confession, and yet such confessions would not *necessarily* be incompetent, the inducements not being illegal.—*Ib.*

195. The relation of the accused to the party to whom the confession is made, has much to do with its competency as evidence. If made to one in authority, in response to an inducement offered, especially if the official personage be in a position likely to enable him to render his inducement effectual, it should be promptly rejected.—*Ib.*

196. It appeared in evidence that, about 8 or 9 o'clock on the night of the homicide, the accused was at the house of the deceased; they were heard mutually quarreling, but they did not seem so angry as to excite apprehension on part of the witness. On next morning, at 8 or 9 o'clock, deceased was found dead, about 100 yards from her house, her skull being fractured, a good-sized stick lying near the body. Matthews arrested accused next morning; rode up to him in a field, about a mile from the place of the homicide, and told him some one had shot the deceased; he replied that she was not shot, but knocked on the head. At that time eight or ten freedmen came up from different directions and tied accused, and took him to where the body of deceased was, and where 100 or 150 freedmen had collected, and were much excited, and who insisted that accused should be hung; no threats or promises were made to extort confessions; accused's hands were tied, and a large crowd had collected around him. Accused said "he and deceased had a quarrel about some clothes, the deceased struck him, and he struck her one blow, not intending to kill her." *Held*, That such confession was properly admitted in evidence to the jury on the trial.—*Ib.*

197. The 9th article of the Rev. Code, 199, is held to introduce a new rule of evidence in the trials of those indicted for violation of its provisions; and where partners are jointly indicted under that article, they may be convicted and punished, although one of them may have been wholly ignorant of the illegal act, each being responsible for the illegal act of his copartner whether he participated in it or not.—*Gathings* v. *State*, 1688.

198. In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases, in order to a conviction, the evidence must produce moral certainty of guilt, to the exclusion of every other hypothesis.—*James* v. *State*, 1741.

199. In both civil and criminal cases a verdict may be founded on circumstances alone; and these often lead to a more satisfactory conclusion than direct evidence.—*Ib.*

200. But although circumstantial evidence in a case of assassination, to justify a convic-

tion of murder, should tend to exclude every other supposition but that of guilt, it need not necessarily be such as to render it *impossible* that any other person besides the defendant could have committed the deed.—*Ib.*

FALSE PRETENCES.

1. Under an indictment for obtaining money by false pretenses, the pretense and its falsity must be fully proven by the state.—*Bowler* v. *State*, 1515.
2. To sustain an indictment for obtaining money under false pretenses, it must be shown not only that the pretenses were false, but also that they were made with the design of obtaining money, and that the money was paid in consequence of the false pretenses.—*Ib.*

FORGERY.

1. On the trial of a party indicted for the forgery of auditor's warrants, the prosecution will not be allowed to prove, with a view of showing that they are bills of credit, that at the time they were issued there was no money in the treasury to pay them, that warrants were not then redeemed, were under par, and circulated from hand to hand as money.—*Pagaud* v. *State*, 273.
2. On the trial of the accused for forgery of auditor's warrants, besides the proof of the handwriting of the accused, there being no positive proof of the forged warrant having been seen in the possession of or uttered by the prisoner; the state proved that he was the clerk of the auditor, had official custody of his books, free access at all times to the registry, and that the forged warrants, in all material respects, corresponded with the genuine ones in the register; whereupon the prisoner proposed to prove that the registry was not always, or generally, in his custody, but was carelessly thrown about the office, accessible to all who might casually enter it, and often with auditor's office itself, for a considerable time, in the care of a single servant. *Held*, That the testimony offered by the accused was proper rebutting testimony and should have been admitted.—*Ib.*.
3. Evidence of a supposed attempt, by the defendant, three years previous to the trial, and the finding of the indictment, to utter forged bank notes, is illegal evidence on the trial of an indictment for a similar offense.—*Morris* v. *State*, 387.

FORMER ACQUITTAL OR CONVICTION.

See Jeopardy.

1. An indictment for stealing a negro man not called a slave is insufficient. A trial and acquittal on an indictment for stealing a negro *man*, is no bar to a subsequent prosecution for stealing a negro man, *slave*. A conviction or acquittal on an invalid indictment, is no bar to a second prosecution.—*State* v. *McGraw*, 22.
2. Under the plea of *autrefois acquit* or *convict*, the evidence is not necessarily and exclusively of record, but may be by parol, to the extent demanded by the circumstances of the case.
3. If the offense charged against a party in a second indictment *be identical* with an offense charged against the same party in a previous valid indictment, upon which he was tried and convicted or acquitted, that judgment will be a bar to the second indictment; and it will be presumed that all the evidence that could be adduced in support of the former indictment was adduced on that trial.—*Rocco* v. *State*, 1280.
4. But in order to render a former acquittal or conviction successful, it is necessary for the defendant to show *the record* of the former proceedings and conviction, and prove *the identity of the offense* and of the *person* charged in the two indictments.—*Ib.*
5. Where a former indictment charged the defendant with retailing spirituous liquors to *John Smith*, and he was subsequently indicted for retailing to *John Hobart*, a plea of *autrefois acquit* under the first indictment is not sufficient to bar his conviction under the second.—*Ib.*

6. An acquittal on an indictment for a greater offense, is a bar to a subsequent indictment for a less offense included in the greater, only where under the indictment for the greater offense the prisoner could have been legally convicted of the less.—*Mumford* v. *State*, 1397.

7. To enable a party relying on a plea of former acquittal to avail himself of this defense, it must appear that he could have been convicted under the first indictment for the offense charged in the second, by the same testimony.—*Ib.*

8. M., a slave, was indicted for the murder of A., and was convicted of manslaughter. The judgment was arrested, because the indictment did not show whether the deceased was a white man or a negro. He was afterward indicted for the manslaughter of A., a white man. *Held*, That the former trial and judgment was no bar to the second indictment, as the first indictment for murder was legally insufficient to support a conviction for manslaughter.—*Ib.*

9. Upon the trial of an issue of a plea of *autrefois acquit* to an indictment for murder by a jury, it is not necessary to ask them if "they have formed or expressed an opinion in regard to guilt or innocence of the prisoner." It is sufficient if they have not formed or expressed an opinion in regard to the question in issue.—*Josephine* v. *State*, 1439.

GAMING.

1. In an indictment under the act "further to suppress and discourage gaming" (Act of 1839, ch. 26), it is not necessary to state the particular game of cards played; it being sufficiently definite for all reasonable or legal purposes to charge that the defendant "did play at a game of cards for money."—*Johnston* v. *State*, 297.

2. Where a party is indicted and tried for suffering a faro bank to be exhibited in the house occupied by him, it is not error to refuse to instruct the jury, "that if the defendant had let the rooms in his house in which the exhibition of the faro bank took place, to certain persons, and that at the time when he let them, he had no knowledge or expectation that they would be used for that purpose, they must find for the defendant."—*Mount* v. *State*, 300.

3. The tenants of the accused, so renting the rooms or tenements from him, were equally subject to indictment and punishment under the statute.—*Ib.*

4. Where a bet is made on the result of a presidential election, it is competent to establish the result of the election by parol testimony.—*Williams* v. *State*, 422.

5. In legal acceptation, United States treasury notes are not money; and if the indictment charge the bet to have been made with them as valuable things, their value must be proved to warrant a conviction.—*Ib.*

6. The laws against gaming will not need a strict construction, for the reason that they are remedial and not penal; hence, reasonable certainty is all that the law requires in regard to this offense.—*Seal* v. *State*, 473.

7. Betting money in this state is indictable, no matter if the subject-matter of the bet might not be within the state.—*Sharkey* v. *State*, 1041.

8. Under the laws of this state, betting on the unknown result of an election which has already been held, is an indictable offense.—*Miller* v. *State*, 1042.

9. It is not necessary, as a general rule, to prove the offense to have been committed on the very day named in the indictment. But whenever time is of the essence of the offence, or a necessary part of the description of it, the time must be proved as laid.—*Ib.*

10. Time is not essential or descriptive of the offense of betting on an election.—*Ib.*

11. To constitute the offense of gaming under the statute, one or other of the parties must gain by the game. But in a game of billiards, in which the loser pays a fee to the owner of the table for its use, neither of the players gain anything. *Ergo*, such a game of billiards is not gaming under a statute.—*Blewett* v. *State*, 1078.

12. An indictment for betting on the result of an election of presidential electors in a certain state, is not sustained by proof of a bet on the result of the presidential election in that state.—*Gamble* v. *State*, 1096.

13. All existing acts against gaming were repealed by the code, and ceased to operate on the first of November, 1857, except as to prosecutions then pending. Rev. Code of 1857, 43, art. 2.—*Charter* v. *State*, 1099.
14. Upon a conviction of gaming, after the revised code went into operation, under an indictment found and returned before that time, the district attorney is entitled to a fee of ten dollars only, and not to the fee allowed by the code.—*Ib.*
15. In prosecutions for gaming, it is essential that it should be alleged and proven that the defendants had wagered or bet money, or something of value, either directly or indirectly, or that they had, in some way, an interest in the game, and would, by the result, either gain or lose.—*Strawhorn et al.* v. *State*, 1388.

GRAND JURY.

See *Indictment*, *Jury*, *Challenge*.

1. By the common law every man was entitled to a trial by his peers—good and lawful men of the county in which the offense was charged. This principle is recognized and established by the constitution of this state, and the right thus secured should be beyond legislation. The caption of the indictment, thus, "The grand jurors of the State of Mississippi, empanelled and sworn in and for the county of Warren," etc., is sufficiently certain to show that they were of the proper county.—*Byrd* v. *State*, 45.
2. Alleging the grand jurors to be the grand jurors of the State of Mississippi, is a sufficient averment, and it is not necessary to allege in the caption of the indictment that they were "then and there" sworn.—*Shuffer* v. *State*, 65.
3. The statute points out the method by which those who are to compose the panel shall be selected, and prescribes their qualifications; and it will be presumed that the court intrusted with this duty has performed it, by placing on the panel none but such as are good and lawful men of the county, in accordance with the provisions of the act. The party can only rebut this presumption by challenge and proof before trial. The question cannot afterwards be raised in another court.—*Cody* v. *State*, 107.
4. It must appear by the record that the grand jurors were sworn; and if the record shows that one of them was "sworn as foreman," it will be sufficient evidence of *appointment* as such.—*Ib.*
5. The record, without any notice of the original *venire*, stated that fifteen persons, naming them, were drawn as a grand jury, and that A. E. D. (one of the number) was sworn as foreman of the same. There is no statement that he was appointed foreman by the court, nor that the remainder of the jurors took the oath required by law of grand jurors. *Held*, that the indictment was fatally defective.—*Ib.*
6. Where the record shows that the indictment was found and returned into court by the whole grand jury, the special appointment of a foreman is not necessary. The indictment, however, will be fatally defective if it have not the name of the prosecutor indorsed upon it.—*Peter* v. *State*, 124.
7. Where the record states at what court, at what term, and in what county the grand jury were empanelled and sworn, it sufficiently appears that they were sworn in and for the county, and the omission to state that they were *then* and *there* sworn, is immaterial, and does not affect the validity of the indictment.—*Gresson* v. *State*, 170.
8. The foreman of the grand jury is competent as a prosecutor, and may be marked as such upon the indictment.—*King* v. *State*, 189.
9. It is not necessary that the grand jury should return with the indictment, the names of the witnesses, or the evidence taken before them. The only return required of them is, whether or not they find a true bill. Nor is it necessary that the record should show that the witnesses were sworn; the presumption will be that they were. —*Ib.*
10. The certificate of the clerk of the probate court that the list of jurors by whom a bill of indictment was found, was drawn in open probate court, in the mode prescribed by law, when the clerk of the circuit court has failed to draw the jurors as required, is

evidence to the circuit court that the panel has been properly drawn.—*Nixon* v. *State*, 226.

11. Where, in organizing the grand jury, a sufficient number is not obtained before the regular *venire* is exhausted, it is not error to complete the necessary number from by-standers summoned by the sheriff under the authority of the court. Sharkey, C. J., *dissented*. — *Dowling* v. *State*, 280.

12. Whether objections to the personal qualifications of grand jurors, or to the legality of the returns, can affect indictments found by them, after such indictments have been received by the court and filed, *query*.—*Ib*.

13. Where a sufficient number of the regular *venire* did not attend to form the grand jury, and the deficiency was supplied from by-standers, summoned by the sheriff by order of the court, and it does not appear by the record that they had the requisite qualifications, the law will presume, until the contrary is made to appear, that they had.—*Ib*.

14. A grand jury composed of twelve men of the panel summoned under the *venire facias*, being all who were in attendance of the panel, and two by-standers summoned by the sheriff, under an order of the court, constitute a good and legal grand jury. The case of Dowling v. The State, 5 S. & M., 664, cited and confirmed.—*Johnston* v. *State*, 297.

15. It is the duty of the circuit court to charge the grand jury when empanelled, in regard to the nature of the duty which they are required to perform, and the motives which should govern them in the discharge of that duty. But the charge is not to be placed upon the record; nor can it be essentially necessary that the record should state that it was given at all, as the matter charged does not constitute ground of error. The charge must be presumed to have been given unless the contrary appears. —*McQuillen* v. *State*, 358.

16. A plea in abatement that the indictment was found by men who were not a part of the original panel, is good, and should be received; and on the trial of the plea it is competent for the defendant to read in evidence the original *venire*, for it is conclusive proof on that point.—*Rawle* v. *State*, 368.

17. Incompetency of the grand jury may be pleaded in abatement, and if true it will defeat the indictment.—*Ib*.

18. There is no law which authorizes the court to take substitutes for any portion of the regular panel. If it can for one, it can for the whole. And if the court do receive substitutes, the indictment found by them will be quashed by plea in abatement.—*Ib*.

19. An accused has the right to challenge, by plea in abatement, the competency of the grand jury by whom the indictment against him is preferred.—*Barney* v. *State*, 426.

20. Indictments, not found by at least twelve good and lawful men, are void at common law, and if any one of the grand jury, who find an indictment, be within any one of the exceptions in the statute, he vitiates the whole, though ever so many unexceptionable persons joined him in finding it.—*Ib*.

21. The statute of this state (H. & H., 490, § 44) requires, among other qualifications of jurors, that they should be either freeholders or householders.—*Ib*.

22. If the contrary does not fully appear from the record, it will be presumed that the grand jury who found the indictment was legally constituted.—*Seal* v. *State*, 473.

23. When no exceptions are taken in the court below to the grand jury, the prisoner cannot, after plea of not guilty, and conviction, for any defects in that body, be entitled to a new trial, in the high court of errors and appeals.—*Brantley* v. *State*, 484.

24. It is essential to the validity of an indictment, that the grand jury by whom it is preferred, should not only possess the requisite qualifications, but that they should also be drawn and empanelled according to law.—*Portis* v. *State*, 583.

25. The circuit court has the power to cause a by-stander to be sworn in the place of a grand juror who is sick or absent. But where the court discharged a grand juror on account of the sickness of his family, and appointed another in his stead, such substituted person is an illegal grand juror and vitiates the whole.—*Ib*.

26. The duties imposed by law upon the assessor of taxes in this state cannot be per-

formed by an agent; and there is no statute which authorizes the assessor to act by deputy.—*Stokes* v. *Johnston*, 634.

27. A grand jury composed of members who do not possess the requisite qualifications, or who have not been drawn, summoned, or empanelled in the manner prescribed by law, have no power to find a valid indictment.—*Ib.*

28. A list of the persons liable to jury service, returned by a person acting as deputy assessor of taxes, is invalid, and a valid grand jury cannot be drawn from it.—*Ib.*

29. The parties to a recognizance, cannot, after the defendant's failure to appear, interpose objections to recognizance, on account of the insufficiency of the grand jury. Objections to the grand jury must be made by the defendant by plea in abatement.—*Borroum* v. *State*, 638.

30. The recital in the indictment that the grand jury "was duly elected, empanelled, and sworn," cannot supply the omission of it in the record.—*Abram* v *State*, 663.

31. The authority of the grand jury to find the indictment must appear in the record, and the bill becomes no part of the record until it is acted upon and returned into open court, in the manner prescribed by law.—*Ib.*

32. The statute in relation to grand juries was manifestly intended to apply to the circuit courts of all the counties then in existence, or that might be afterwards created by statute.—*Leathers* v. *State*, 679.

33. A grand jury composed of members who have not been drawn, summoned, or empanelled according to law, is illegal, and all their acts are void. Therefore where the clerk and sheriff draw a *venire* composed of forty persons, instead of the number required by law, an indictment preferred by a grand jury selected from such *venire*, is invalid.—*Ib.*

34. The high court of errors and appeals will give no countenance to objections to the grand jury, when no complaint was made in the court below, and the accused submitted himself to trial, and was convicted.—*McCarty* v. *State*, 705.

35. After a party has pleaded in bar to an indictment, and been convicted, it is too late to urge objections to the constitution of the grand jury. Such objections must be pleaded in abatement, or they will be considered as waived.—*Leathers* v. *State*, 788.

36. The record is the only evidence of the organization of the grand jury, and whether the proper oath was administered or not, is never ground for a plea in abatement, and such plea should be disregarded by the court.—*Smith* v. *State*, 802.

37. The annual list of jurors returned by the assessor of taxes does not annul or supersede the lists previously returned, but is intended to return the names of such persons as may have been previously omitted, or have since become liable to jury duty. Therefore, a person whose name did not appear on the list last returned, but did appear on the one next before the last, and was drawn from box number one, is a competent grand juror.—*Sumrall* v. *State*, 803.

38. The record should show affirmatively that the grand jury who found the indictment was duly sworn. The formal statement in the indictment itself, that they were sworn, is insufficient.—*Foster* v. *State*, 885.

39. It is unnecessary for the record to show that the grand jury were summoned at least five days before the commencement of the term of the court, or that the members thereof were over twenty-one and under sixty years of age, or that they were taken equally from each police district in the county.—*Weeks* v. *State*, 903.

40. The legislature, in requiring the sheriff to summon twenty men to serve as grand jurors, did not intend thereby to designate the number of which the grand jury should be composed, but only to provide a body of men, out of whom a grand jury should be selected, and it will not be error, if the whole twenty who are in attendance on the court, be not empanelled on the grand jury.—*Ib.*

41. The indictment, after reciting the state and county and the term of the court, and averring that "the grand jurors of the State of Mississippi, being good and lawful men of the county of W., aforesaid, and being then and there duly elected, empanelled, and sworn," etc., is sufficient to show that the grand jury was composed of duly qualified men.—*Ib.*

42. Objection to an illegal grand jury may be made by motion in arrest of judgment.—*Miller* v. *State*, 1042.

43. The provision of the statute that grand jurors shall be summoned "at least five days" before court, is merely directory, and for the convenience of the persons summoned, who, if not allowed the five days' notice, might not be obliged to attend; but the observance of this provision is certainly not necessary to the legality of the grand jury.—*Johnson* v. *State*, 1049.

44. The manner of selecting the grand jury from those summoned to attend as grand jurors, and who are in attendance, is left to the discretion of the court; and it will not be improper for the court to cause them to be sworn and empanelled in the order in which their names are returned by the sheriff, until a sufficient number are sworn to constitute the grand jury.—*Box* v. *State*, 1080.

45. A grand jury, under the statute, composed of more than eighteen, and less than thirteen persons, is illegal, and an indictment found by them is void and should be quashed.—*Ib.*

46. When there is nothing in the record to show what number of persons constituted a grand jury, and nothing to show that the persons summoned and sworn were not residents of the county, it will be presumed, in support of a judgment, that the grand jury was composed of a lawful number of lawfully qualified persons.

47. The foreman of a grand jury whose name was Lazarus J. Jones, indorsed a bill of indictment by his signature L. J. Jones, and it appearing that he was in fact the same person, the indorsement is held sufficient.—*Easterling* v. *State*, 1086.

48. Under the Rev. Code, 614, art. 252, a grand juror who found the bill of indictment is a competent witness for the state, on the trial of it.—*Ib.*

49. A plea in abatement to an indictment for murder, alleging that the grand jury who found it, were an illegal body, because they were selected by an illegal board of supervisors, is bad; the acts of a board who are only *de facto*, being as valid as to third persons, as those of a board *de jure*.—*Durrah* v. *State*, 1668.

50. The empanelling of a grand jury is made by statute conclusive evidence of its qualifications and competency; and after it has been organized and sworn, no exception can be taken to its legality as a whole, or to the qualifications of its constituent members. Head v. The State. And it is not error to refuse the defendant leave to withdraw his plea of not guilty, and to plead in abatement to the indictment, unless he presents matter in abatement true in point of fact, and valid in law.—*Ib.*

HABEAS CORPUS.

See *Bail and Recognizance.*

1. Where a prisoner had a right to demand a discharge upon showing that he had been imprisoned for two stated terms of the court, without having been prosecuted by indictment and trial, it would be presumed, if the court refused to discharge, that there was no evidence before the court to support the application; or that the contrary was established.—*Byrd* v. *State*, 45.

2. The *habeas corpus* act is, in every particular, of a highly remedial character, and should be construed, like all statutes of that class, with a view to the advancement of the objects of its enactment. All laws are obligatory only in the sense in which they are intended by the law-making power to operate.—*Ib.*

3. Where the prisoner was held in confinement on a charge of being accessory to murder, from February, 1833, to February, 1834, and was not indicted and tried, the two intermediate regular terms of the circuit court having failed to be held, he is not entitled to be discharged under the 14th section of the *habeas corpus* act. That act contemplates terms of the court which shall have been *held;* and the object of the legislature was to provide against unnecessary or oppressive delays.—*Ib.*

4. The language of the statute shows that in order to entitle the prisoner to a discharge, the state must have been in default; but as to the fact whether the term has been held or not, is wholly beyond the power of the state, the presumption of default cannot arise.—*Ib.*

5. The affidavit, as a foundation for the issuance of a writ of *habeas corpus*, can be legally made before a justice of the peace; and if it falsely alleges matter material to the order for the writ, the party may be convicted of perjury. But if the false matter be wholly immaterial as a foundation for ordering the writ, it is otherwise. It is sufficient for one in custody to make affidavit that he is illegally so detained, and he is entitled as a matter of right to the writ.—*White* v. *State*, 209.

6. By the constitution of this state, all prisoners, before conviction, are bailable by sufficient securities, except for capital offenses, where the proof is evident or presumption great.—*Dyson ex parte*, 641.

7. The circuit courts of this state now possess and may exercise the power of bailing after conviction in all cases not capital, whenever a sound discretion will warrant it. *Semble.* In cases of misdemeanor, whenever the party obtains a writ of error and *supersedeas*, this discretion ought always to be exercised in favor of bail.—*Ib.*

8. In cases of bail each case must depend upon its individual merit. And, after a full inspection of the case, if the court does not find the existence of those special circumstances which ought to exist, bail will be refused.—*Ib.*

9. The sufficiency of a pending indictment, which has been adjudged sufficient in the circuit court, cannot be inquired into on *habeas corpus*. That judgment, until set aside, is the law of the case. But the evidence on which the indictment was found may be adduced, and if it appear that accused should not be held in custody, he may be discharged.—*Emanuel et al.* v. *State*, 1217.

10. On a writ of error in *habeas corpus* proceedings, the supreme court exercises purely a revisory and correctionary jurisdiction. The judgment reviewed is presumptively correct, and error must be shown. The supreme court have no larger discretionary power to bail than the court of original jurisdiction.—*Street* v. *State*.

11. If the testimony be conflicting, or the credibility of witness be involved, the appellate court would regard the circuit judge who heard it orally as in the most favorable condition to come to a correct conclusion, and would not disturb his decision.—*Ib.*

12. If the testimony make the impression on the mind of the supreme court, that the petit jury would be warranted in a verdict of guilty, the judgment of the circuit judge denying bail would be affirmed.—*Ib.*

13. If the return to this writ is, that the relator is in custody to answer an indictment for murder, lawful authority for the detention is shown; and if no testimony were offered to show a lesser grade of felonious homicide, or that the accused ought not to be convicted of any offense, it would be the duty of the judge to remand.—*Ib.*

HOMICIDE.

1. On an indictment for murder, the prisoner may be acquitted of the charge of murder, and be found guilty of manslaughter.—*King* v. *State*, 189.

2. Where a prisoner, indicted for murder, cannot, by the rules of law, be put upon his trial until the last judicial day of the then term of the court has partially elapsed, it will not be an infraction of the constitution entitling him to a speedy trial, for the court, upon the application of the state, to postpone the trial to the next term.—*Nixon* v. *State*, 226.

3. Where a slave has been killed by his master and overseer, or either, in inflicting chastisement upon him, the rules of the common law, upon the subject of murder, will regulate the character of the offense.—*Kelly and Little* v. *State*, 235.

4. Under the laws of this state, the master is liable to be indicted for an assault and battery upon his own slave, when he has inflicted cruel and unusual punishment on him; and it is for the jury to determine what constitutes such cruel and unusual punishment.—*Ib.*

5. Intoxication may be a circumstance proper for the consideration of the jury upon the question of intention or malice on the part of the offender, but it is no legal excuse or extenuation of the crime.—*Ib.*

6. D. being indicted for the murder of a slave, and it being proved that D. was acting in the capacity of overseer for B., a witness on the part of the state was permitted,

although objected to by the prisoner's counsel, to testify as to the prisoner's general habit, as overseer, in punishing slaves upon the plantation of the owner of the slave killed. *Held*, by the court, that such evidence was inadmissible, being calculated to prejudice the jury against the prisoner, and not being responsive to any charge in the indictment.—*Dowling* v. *State*, 380.

7. Where, on the trial of a prisoner for murder, the court charged the jury that "every homicide is presumed to have been committed with malice aforethought, and it devolves on the prisoner to prove the circumstances which excuse the act," the charge was held to be too broad and unrestricted; that it should have been qualified by adding, "unless they arise out of the evidence produced against him."—*McDaniel* v. *State*, 336.

8. Every indictment of murder charges that the prisoner did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased. The fact of killing, and the intent, must concur to constitute the crime of murder; and if the jury from the whole evidence doubt either of these facts, the prisoner is entitled to the benefit of such doubt; or to be either acquitted or convicted of a crime of less grade than murder, according to the circumstances. But in cases where the killing is proved, and no circumstances appear to the contrary, the law presumes malice in the slayer; and these presumptions, if unopposed, may amount to full proof of the fact.—*Ib.*

9. No trespass on the personal property of a person will justify the killing of the trespasser; and any such killing with a deadly weapon will constitute murder.—*Ib.*

10. On a trial for murder it is material to instruct the jury what, under the law, constitutes murder.—*Boles* v. *State*, 397.

11. If S. has already formed the murderous design, and K. encourages him to carry it out, by stating falsehood, or otherwise, K. is guilty as accessory.—*Keithler* v. *State*, 403.

12. The general rule is, that no words of reproach, or provoking or insulting language, or actions short of an assault, will furnish excuse for a homicide, even when committed at the time of the killing.—*Jolly* v. *State*, 450.

13. When the manner of the homicide is not fully shown, a known character for violence of temper and dangerous desperation in the deceased may serve to raise presumption in favor of the prisoner. But the general character for insolence cannot furnish an excuse.—*Ib.*

14. In cases of homicide, where the wound is inflicted in one county and the death takes place in another, the indictment must be preferred in the latter, or it will be void.—*Stoughton* v. *State*, 460.

15. An indictment for murder includes an indictment for manslaughter, and the statute will apply precisely as though the prisoner had been indicted for manslaughter.—*Howard* v. *State*, 465.

16. The verdict of a jury, on the trial for murder, finding a person guilty of manslaughter, operates as an acquittal of the charge of murder, and will be a bar to a second prosecution for the same offense.—*Hurt* v. *State*, 645.

17. A high degree of sudden and resentful feeling will not alone palliate an act of homicide committed under its influence. It is essential that the excited and angry condition of the party committing the act, which would entitle him to a milder consideration of the law, should be superinduced by some insult, provocation, or injury, which would instantly produce in the minds of ordinary men the highest degree of exasperation.—*Preston* v. *State*, 650.

18. If a party be present with the intention of giving assistance, if necessary, in the killing, he would be an aider and abettor, and a principal in the second degree, though his assistance might not be called into actual requisition. Presence and intention to aid in killing amount to participation.—*McCarty* v. *State*, 705.

19. Bare fear of danger or great bodily harm, unaccompanied by any overt act indicating a present intention to kill or injure, will not warrant a person in killing another. There must be actual danger at the time. There must be an overt act on the part of the deceased to carry out his threats to warrant his killing, or the danger of such design must be imminent, pressing, and unavoidable.—*Dyson* v. *State*, 710.

20. Every homicide is presumed to be murder, until the contrary appears from facts or circumstances proved. Malice is implied from the nature and character of weapon used.—*Green* v. *State*, 788.

21. If a party enter into a conflict with a deadly weapon, not intending to use it, but only resort to it in the heat of conflict, and death ensue, the offense is manslaughter. But if he intends from the first to use it, if necessary, to overcome his adversary, and do use it, and kill his adversary, it is murder. And this, although the slayer habitually carried the weapon. The court may modify instructions asked by either party before giving them to the jury. The phrase "great personal injury" in our statutes is equivalent to "great or enormous bodily harm," or danger of loss of life or limb.—*Ib.*

22. Homicide is justifiable where the accused had a reasonable ground to apprehend a design to commit a felony, or do some great personal injury to his wife, and there is imminent danger of the design being accomplished.—*Staten* v. *State*, 834.

23. The accused must be entitled to have rules distinctly declared to the jury.—*Ib.*

24. A party indicted for murder may be convicted of any degree of manslaughter that the evidence warrants; but he cannot be convicted of manslaughter, unless the indictment be found within one year next after the offense shall have been committed.—*Riggs* v. *State*, 846.

25. To excuse one person in taking the life of another, on a plea of self-defense, there must have existed at the time of the killing a reasonable ground to apprehend a design on the part of the deceased to commit a felony or some great personal injury upon the accused, and at the same time immediate danger of its accomplishment. The reasonable ground to apprehend the design, *and* the imminent danger, must both exist, and the homicide must have occurred, all at one and the same time.—*Cotton* v. *State*, 915.

26. As a means of determining the fact of the reasonable apprehension of design and danger, the peculiar character of the hostile party is as much a fact for the consideration of the jury as any other fact in issue.—*Ib.*

27. But it may occur, in an extreme case, that although there be no actual danger at the moment, the danger may be increased by delay, or by allowing the hostile party to escape and arm himself; and hence upon this subject a court can, with safety or propriety, lay down only general, and not universal, rules.—*Ib.*

28. In the absence of all proof of the facts or circumstances attending a homicide, the law presumes it to have been malicious, and therefore murder. But under such circumstances the law never presumes it to have been manslaughter. Such a presumption would be error.—*Hague* v. *State*, 1081.

29. The jury were instructed that "If the act producing death be such as is ordinarily attended with dangerous consequences, as by the use of a deadly weapon, or be committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation be shown; for the inference is that the natural or palpable effects of any acts deliberately done were intended by the agent." *Held* to have been properly given.—*Mask* v. *State*, 1100.

30. Where a person prepares and conceals a deadly weapon, before entering into a fight which he provoked, with the determination of using it, if necessary, in the fight, it is evidence of malice, which, if he kill his antagonist, would constitute murder.—*Price* v. *State*, 1168.

31. "If a party enters into a contest dangerously armed, and fights under an undue advantage, though mutual blows pass, and kills his adversary, it is not manslaughter but murder."—*Ib.*

32. A slave, indicted for the murder of his overseer, cannot introduce as evidence in his defense that the deceased a few hours before the killing had forced the prisoner's wife to submit to sexual intercourse with him, and that this had been communicated to the prisoner before the killing.—*Alfred* v. *State*, 1235.

33. When it is shown that the accused had reasonable grounds to apprehend immediate danger to his life from the deceased, the character of the deceased, in connection with

previous threats, may be given in evidence as explanatory of the motives upon the defendant's action.—*Wesley* v. *State*, 1259.

34. To make a homicide justifiable on the ground of self-defence, the danger must be either actual, present, and urgent, or the homicide must be committed under such circumstances as will afford reasonable ground to the party charged to apprehend a design to commit a felony, or do him some great bodily harm, and that there is imminent danger of such design being accomplished.—*Ib.*

35. A homicide, where the party killing is in no danger, actual or real, and has no reason to apprehend danger, is murder.—*Ib.*

36. It is the province and exclusive right of the jury to weigh the evidence, and to determine the facts of the case submitted to their consideration. Hence, it is error for the court to instruct the jury as to the weight of the evidence before them, or to charge that any fact material to the issue was proved. But if it is shown that the prisoner was not injured by the giving of such instructions, the error will not be corrected.—*Ib.*

37. Where it does not appear from the evidence that the deceased made any hostile demonstration against the accused at the time of the killing, nor even that the threats which he had previously made against the accused were known to the accused, the latter has no reason to believe that the feelings of hostility which caused the deceased to assault and beat him on a previous occasion still continued, or that there was danger of a deadly assault upon him by the deceased at the time of the killing.—*Newcomb* v. *State*, 1303.

38. In cases of resistance and rebellion in a slave, the authority and power of the master is only to be limited by the necessity occasioned by the unlawful resistance to *lawful* authority. If, without necessity, in reducing his rebellious slave to subjection, the master wantonly take his life, he would be guilty of murder or manslaughter, according to the circumstances. Or if the master, by inhuman or brutal treatment, endangering the life or limb of the slave, induce resistance necessary on the part of the slave to save his life or limb, and the master, in the further prosecution of his unlawful conduct, take the life of the slave in such conflict, the master would be guilty of murder.—*Oliver* v. *State*, 1374.

39. If the master, in the exercise of lawful authority, in a lawful manner, be resisted by his slave, then the master may use just such force as may be requisite to reduce his slave to obedience, even to the death of the slave, if that become necessary to preserve the master's life, or to maintain his lawful authority.—*Ib.*

40. On the trial of a slave for the murder of one of her master's family, it is competent for the state to prove by the master the prisoner's conduct and deportment towards witness, his wife, or his family; what she may have said expressing content or discontent towards him or his family, and of her situation, and condition of kindness or unkindness towards himself and family, and all acts of obedience or disobedience, subordination or insubordination, in the witness' family, to show the state of feeling of the prisoner, and as connected with the question of motive on her part to commit the deed charged against her.—*Josephine* v. *State*, 1439.

41. Where there is no evidence tending to connect another party with the killing, and no fact going to show that such person had an opportunity to commit the act, testimony that such other person had made statements in relation to a previous poisoning, and her intention to commit the crime again, is clearly irrelevant, and should not be admitted. So also is a proposed examination of a witness as to his having had sexual intercourse with such other person.—*Ib.*

42. On the trial of a slave for poisoning one of her master's family, it is competent for her to prove, in regard to the question of intent, that her master had been in the habit of sexual intercourse with her.—*Ib.*

43. The crime of murder is not complete until the death occurs.—*Harrell* v. *State*, 1472.

44. In order to fix the guilt of a party charged as accessory after the fact, it is essential that the alleged felony should be complete. Until such felony has been consummated, any aid or assistance rendered to a party in order to enable him to escape the conse-

quences of his crime, will not make the person affording such assistance guilty as an accessory after the fact.—*Ib.*

45. In cases of felonious homicide, the *corpus delicti* consists of two fundamental and necessary facts: First, the death; and secondly, the existence of criminal agency as its cause.—*Pitts* v. *State*, 1655.

46. The death must be proved by direct testimony, or by presumptive evidence of the strongest kind, and the criminal agency may then be established by presumptive reasoning upon all the facts and circumstances of the case.—*Ib.*

47. When the dead body or remains have been discovered and identified, and the immediate cause of death remains unknown, the sworn observations and opinions of physicians, surgeons, chemists, and other scientific persons who have examined the body or remains, are often of the greatest value as testimony explaining the means of death.—*Ib.*

48. Facts ascertained by reason of a confession may be considered in establishing the *corpus delicti;* but a confession not made in open court, or before the examining magistrate, but to an individual, uncorroborated by circumstances, and without proof, *aliunde*, that a crime has been committed, will not justify conviction; but the *corpus delicti* must be proved independently of extra-judicial confessions, and beyond reasonable doubt; and without such proof of the *corpus delicti*, evidence of the confession is inadmissible at the trial. Stringfellow v. The State, 26 Miss. R., 157, cited and approved.—*Ib.*

49. Where a person of generally good health dies suddenly, and the symptoms and appearances indicate narcotic poison of Jamestown weed or *stramonium*, but are similar also to symptoms common to disease of the heart, or congestion of the brain or stomach, and the testimony and opinions of several physicians who examined the stomach and contents, without any analysis, is conflicting and leave it in doubt, with the probabilities equally balanced, whether the deceased died of poison or of disease—these facts, though accompanied by proof of a confession of the accused that he had administered Jamestown weed, are not sufficient to warrant conviction.—*Ib.*

50. Circumstantial evidence should be acted upon with great caution, especially where the public anxiety for the detection of a great crime creates an unusual tendency to exaggerate facts and draw rash inferences.—*Ib.*

51. The instruction that "it is incumbent on the state to prove the allegations in the indictment, or to make out its case. When a killing has been proved, the burden of proof changes, and it is then incumbent on the defendant to show excuse or justification, &c., and if he has failed to do this, the jury may find him guilty," is erroneous; the true proposition of law is, "if there be no excuse or justification for the homicide by the defendant, shown in the evidence adduced by the state, then he is guilty of murder, unless he has by his evidence proved excuse or justification.—*Head* v. *State*, 1700.

52. The law presumes a man to intend the necessary consequences of his act; hence the use of a deadly weapon is *prima facie* evidence of malice, unless it be used to disable an adversary in the very act of making a murderous and malicious assault; and then the presumption of malice is overcome.—*Ib.*

53. Every man is justified in protecting his life and limb at whatever hazard, but the danger must be present, imminent, and immediate; a mere fear or apprehension, arising from previous threats communicated, afford no excuse, unless at the time of the killing an effort was being made to put the threats in execution, and a real or apparent necessity existed at the time to slay in order to prevent it.—*Ib.*

54. It was no error to refuse to instruct the jury "that if an armed person (not armed with reference to a controversy with the deceased) became involved in a difficulty with deceased, and took his life with such weapon, that malice cannot be inferred simply from the fact of the use of such weapon." The mere fact that the law permits a man to bear arms for self-defense, does not in the slightest degree diminish the responsibility for an improper use of them.—*Ib.*

INDICTMENT.

See *Abatement*, *Grand Jury*.

1. A prosecutor in an indictment for an assault and battery, with intent to murder, who has commenced a civil suit for the injury, will not be compelled to elect or abandon the civil suit, or the prosecution; but both may be sustained, the first for damages to the injured individual, the second to avenge the public wrong.—*State* v. *Blennerhassett*.

2. Defendants separately indicted for the same assault and battery, may be tried jointly, although they may have claimed the right to be tried separately.—*Ib*.

3. An indictment for stealing a negro man not called a slave is insufficient. A trial and acquittal on an indictment for stealing a negro *man*, is no bar to a subsequent prosecution for stealing a negro man, *slave*. A conviction or acquittal on an invalid indictment, is no bar to a second prosecution.—*State* v. *McGraw*, 22.

4. The office of an indictment is to connect the libel with the extrinsic facts, to show the meaning and bearing of words and phrases used in it, and is necessary, when the words published would not be libellous, unconnected with such facts.—*State* v. *Chace*, 30.

5. An indictment commencing with the words "The State of Mississippi" and concluding "against the peace and dignity of the same," is sufficient.—*State* v. *Johnson*, 32.

6. If the words "then and there" precede every material allegation, it is sufficient, though these words may not precede the conclusions drawn from the facts.—*Ib*.

7. In an indictment, under the act of 1830, prohibiting any person other than Indians, from making settlements within their territory, it is necessary to aver that the defendant is not an Indian.—*State* v. *Craft*, 41.

8. By the common law every man was entitled to a trial by his peers—good and lawful men of the county in which the offense was charged. This principle is recognized and established by the constitution of this state, and the right thus secured should be beyond legislation. The caption of the indictment, thus, "The grand jurors of the State of Mississippi, empanelled and sworn in and for the county of Warren," etc., is sufficiently certain to show that they were of the proper county.—*Byrd* v. *State*, 45.

9. Alleging the grand jurors to be the grand jurors of the State of Mississippi, is a sufficient averment, and it is not necessary to allege in the caption of the indictment that they were "then and there" sworn.—*Shaffer* v. *State*, 65.

10. It is the province of the caption of an indictment to show when it was found, and before what court. And where the record states that "the grand jury was empanelled and sworn to inquire in and for the body of the county of Warren, viz., J. C., foreman," etc.; this is sufficient evidence that the grand jury was sworn, Castleman as foreman; and the swearing him as foreman was a sufficient appointment.—*Byrd* v. *State*, 73.

11. An allegation in an indictment that the prisoner committed the act in A. D. 1030, presupposes the life of the accused to have continued over eight hundred years, and contradicts a known law of nature and vitiates the indictment.—*Serpentine* v. *State*, 82.

12. Where the caption of the indictment was: "The State of Mississippi, Wilkinson county, ss. The circuit court of Wilkinson county, October term, 1835, thereof, in the year of our Lord, 1835. The grand jurors of the State of Mississippi, empanelled and sworn, in and for the county of Wilkinson and the State of Mississippi, at the term aforesaid, in the name and by the authority of the State of Mississippi, upon," etc., it was held a sufficient allegation that the grand jurors were of the State of Mississippi, and of the county of Wilkinson; and also that they were *then* and *there* sworn. If the record show that A. B. *was sworn as foreman*, it is sufficient evidence that he was *appointed* foreman.—*Woodsides* v. *State*, 95.

13. Where it is stated in the indictment that the wounds of which the deceased died, were inflicted on the 8th day of September, 1835; and "that from said day he, the said H. P. S., until the 13th day of September, 1835, in the county of W., did languish, and languishing did live, on which said 13th day of September, 1835, etc., he

died; and the said Alexander Woodsides, *then and there*, etc., was present, aiding and abetting the said Samuel Woodsides, and Robert Woodsides, in the felony and murder aforesaid, in manner and form aforesaid;" *Held*, that these allegations in the indictment are sufficiently certain, and form no ground for reversing the judgment.—*Ib.*

14. An indictment may be found at the special terms of the circuit court. Byrd v. State, 1 How., 163, cited and approved.—*Young* v. *State*, 106.

15. The 69th section of the act "for the punishment of crimes and misdemeanors," Rev. Code, 309, requires the district attorney to mark on all bills of indictment, the name of the prosecutor; an omission to do so is fatal to the indictment.—*Ody* v. *State*, 107.

16. Where the record shows that the indictment was indorsed a true bill by one of the grand jurors, and that it was returned into court by the authority of the whole fifteen jurors who composed the panel, it is sufficient without the special appointment of a foreman.—*Friar* v. *State*, 114.

17. A general verdict of guilty will be sustained, although all the counts of the indictment are bad but one.—*Ib.*

18. Where the record shows that the indictment was found and returned into court by the whole panel, the special appointment of a foreman is not necessary. The indictment, however, will be fatally defective if it have not the name of the prosecutor indorsed upon it.—*Peter* v. *State*, 124.

19. Where the appellate court reverses the judgment of the court below for the want of form in the indictment, the indictment will be considered sufficient *prima facie* evidence of guilt to remand the prisoner.—*Ib.*

20. The caption of the indictment was as follows: "The State of Mississippi, county of Hancock, the circuit court of Hancock county, August term thereof, in the year of our Lord one thousand eight hundred and thirty-eight. The grand jurors of the State of Mississippi, empanelled and sworn in and for the county of Hancock and State of Mississippi, at the term of the court aforesaid, upon their oaths present," etc. *Held*, that it does not show with legal certainty that the grand jury was taken from the body of good and lawful men of Hancock county.—*Carpenter* v. *State*, 126.

21. In an indictment for perjury, it is not necessary to allege that the false affidavit charged an offense upon any particular individual, in order to constitute the crime of wilful perjury.—*Ib.*

22. A count in an indictment on the statute, charging that the defendant did unlawfully sell and retail vinous and spirituous liquors, to wit: wine, rum, gin, brandy, and whiskey, in a less quantity than one gallon, to persons to the jurors unknown; and that the said defendant did then and there suffer and permit the said vinous and spirituous liquors, so retailed and sold in less quantities than one gallon, as aforesaid, to be drank and used in and about the house of him, the said C., contrary to the form of the statute, etc., was held to be good.—*Kliffield* v. *State*, 150; *Nos* v. *State*, 153.

23. A count charging that the defendant, as a tavern and inn-keeper, did unlawfully, gratuitously, and without special charge therefor, offer, give, and deliver vinous and spirituous liquors, etc., in less quantity than one gallon, to divers persons to the jurors unknown; which said persons were then and there the guests of the said C., contrary to the statute, etc., was held to be good.—*Ib.*

24. A count charging that the defendant, inn-keeper, etc., did then and there, by evasion, etc., violate the plain intent and meaning of an act, etc., is too vague and uncertain, and will not warrant a conviction. When the indictment contains several counts, and one of them is good, it will sustain the verdict of "guilty."—*Ib.*

25. The time of the commission of the offense laid in the indictment is not material, and it does not confine the proof within the limits of that period; the indictment will be satisfied by proof of the offense at any anterior day.—*Oliver* v. *State*, 157.

26. It is the office of the caption of an indictment, to state with sufficient certainty, not only the style of the court, the judge there presiding, but the time and place, when and where it was found, and the names of the grand jurors by whom it was

found. Where the caption of the indictment, after stating the style of the court, and the term, proceeds to state that "the grand jury came into court and presented the following bill of indictment, and say they are content that the court shall alter therein anything, the same being matter of form and not of substance," it was held to be insufficient and uncertain, and the indictment should be quashed.—*Thomas* v. *State*, 160.

27. Where it appears from the whole record that the prosecution was in the name of the state, a formal statement in the indictment, that it was found by the authority of the state, is not necessary.—*Greeson* v. *State*, 170.

28. Where it appeared by the record that a foreman was appointed, and that the indictment was returned, signed by him, and the caption stated that the grand jury returned the bill into court by their foreman, it was held sufficient evidence that the bill was returned by the authority of the grand jury.—*Ib.*

29. Where the property feloniously taken was laid in the indictment as the property of Richard Gaines, but was afterwards recited as the property of the said Robert Gaines, it was held to be a mere clerical error, and that it did not constitute repugnance.—*Ib.*

30. Where the indictment charged that the prisoner, "with force and arms in the county aforesaid, in and upon the left arm of him, the said Alson Shelby, then and there feloniously and maliciously did, with a certain drawn knife, stab and wound, with intent, then and there, feloniously, wilfully, and of his malice aforethought, the said Alson Shelby, to kill and murder," the indictment was held bad, because it did not allege that the prisoner "did *assault and beat*," and because it did not charge that the instrument was a *deadly weapon*.—*Ainsworth* v. *State*, 183.

31. The act of 1839, which declares that "it shall not be lawful for any person to sell or retail any vinous or spirituous liquors in less quantities than one gallon, nor suffer the same, or any part thereof, to be drank or used in or about his or her house," creates two distinct offenses; and hence an indictment which charges the defendant with "selling or retailing less than one gallon," and "permitting the same to be used in and about his or her house," is bad for duplicity.—*Miller* v. *State*, 186.

32. The caption of the indictment stated, that the court was held for the county of Smith, at the court-house, in the town of Raleigh; and the town of Raleigh, in Smith county, was incorporated, by act of the legislature, in 1838, and by another act of the legislature, passed in 1836, the county site of the public buildings of Smith county was located in what is now a part of the town of Raleigh; *held*, that the caption of the indictment sufficiently showed that the court was held at the place designated by law.—*Kelly and Little* v. *State*, 235.

33. Numerical figures may be used in an indictment to express numbers and dates; if, however, they are illegible, the indictment will be bad for uncertainty.—*Ib.*

34. The record showed the following entry: "On the 3d day of April, 1844, the following entry was made on the minutes of the court, to wit: The grand jurors returned into court an indictment against William S. Goodwin, endorsed thereon a 'true bill:' Wm. M. C. Mirus, foreman of the grand jury, and returned to consider of further presentment. Said indictment is in the words and figures following, to wit:" *Held*, that these words show, with sufficient certainty, that an indictment was returned into court by the grand jury, and that the accused was indicted in due form.—*Goodwyn* v *State*, 257.

35. Where the minutes of the court omit to state the character of the offense charged in the indictment, such omission forms no ground of error, if it be supplied by the other parts of the record. The rule is well settled that what is uncertain in any part of the record may be explained and rendered certain by reference to another part which is certain.—*Ib.*

36. In an indictment under the act "further to suppress and discourage gaming" (Act of 1839, ch. 26), it is not necessary to state the particular game of cards played; it being sufficiently definite for all reasonable or legal purposes to charge that the defendant "did play at a game of cards for money."—*Johnston* v. *State*, 297.

37. Grand larceny in this state consists in the stealing, taking, and carrying away of any property of greater value than twenty dollars, and where a prisoner has been indicted in two counts, each charging this offense, the verdict of the jury finding him guilty, generally, without specifying the value of the stolen property, will be sufficient to warrant a sentence and judgment for the offense of grand larceny; although the jury *might*, under the indictment, have found a verdict for *petit* larceny.—*Wilburn* v. *State*, 333.

38. Every indictment of murder charges that the prisoner did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased. The fact of killing, and the intent, must concur to constitute the crime of murder; and if the jury from the whole evidence doubt either of these facts, the prisoner is entitled to the benefit of such doubt; or to be either acquitted or convicted of a crime of less grade than murder, according to the circumstances. But in cases where the killing is proved, and no circumstances appear to the contrary, the law presumes malice in the slayer; and these presumptions, if unopposed, may amount to full proof of the fact.—*McDaniel* v. *State*, 336.

39. It is not necessary that all the averments in an indictment should be proved as laid, in order to warrant a conviction. The general rule is that every material averment must be proved, yet it does not follow that it is necessary to prove the offense charged to the whole extent as laid. It is enough if so much of a charge be proved as constitutes an offense punishable at law.—*Swinney* v *State*, 351.

40. When a plea in abatement to an indictment is demurred to, and the demurrer overruled, the judgment of the court should be that the indictment be abated.—*Rawls* v. *State*, 368.

41. Under the statute of 1842, amendatory of the statute of 1839, "for the suppression of tippling houses," etc., sec. 2, appropriating all the money accruing from the granting of licenses to retail, and from fines for violations of the statute committed within the city of Vicksburg, to that city, the particular place where the offense was alleged to have been committed became a fact and circumstance constituting the offense, and is necessary to be established by proof, as stated in the indictment.—*Ligori* v. *State*, 382.

42. Where a party is found guilty on three counts of an indictment, and acquitted upon one, and a new trial granted, the new trial should be had upon the three counts on which he was found guilty.—*Morris* v. *State*, 387.

43. Where an indictment contains four counts, and the jury find the accused guilty as to the three last, the verdict is sufficient to warrant a judgment. Swinney v. State, supra 376, cited and approved.—*Ib.*

44. It is the duty, but not an essential one, that the district attorney should sign the bill of indictment; but the absence of his signature does not affect the validity of the indictment.—*Keithler* v. *State*, 403.

45. An indictment that charges an "assault and battery with a deadly weapon upon a certain slave, 'with intent to commit manslaughter,'" can only be construed to charge an aggravated assault.—*Bradley* v. *State*, 416.

46. An indictment for assault with intent to kill, without alleging an assault upon a particular person with an intent to kill that person, is defective, and may be taken advantage of by motion in arrest of judgment.—*Jones* v. *State*, 418.

47. Indictments, not found by at least twelve good and lawful men, are void at common law, and if any one of the grand jury, who find an indictment, be within any one of the exceptions in the statute, he vitiates the whole, though ever so many unexceptionable persons joined him in finding it.—*Barney* v. *State*, 426.

48. It must appear from the record that the court is held at the proper place within the county; and it is error for the court to sit at any other place; and a plea in abatement alleging these facts, when sustained, is sufficient to quash the indictment.—*Sims* v. *State*, 430.

49. The caption of the indictment stated that the court was held at Tallula; the prisoner plead that Tallula was not at that time the county seat; to which the state demurred:

held, that the demurrer admitted that the court was not holden at the place designated by law, and that the indictment should, therefore, be quashed.—*Ib.*

50. An indictment is defective if the name of the prosecutor is not marked on it.—*Moore* v. *State*, 464.

51. If an indictment is defective because the name of the prosecutor is not marked on it, it is too late to remedy it by amendment after trial. The law of amendments does not apply to criminal cases.

52. It is a general rule that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it. They must also pursue the precise and technical language employed in the statute in the description of the offense.—*Anthony* v. *State*, 467.

53. The proper manner to take advantage of a defective indictment is by a plea in abatement.—*Seal* v. *State*, 473.

54. The neglect to mark on the indictment the name of the prosecutor, is a fatal objection.—*Kirk* v. *State*, 480.

55. An indictment, charging in one count an assault with intent to kill, and a second count charges an assault and battery, is good, and the jury may acquit the accused as to the first count, and find him guilty as to the second.—*Brantley* v. *State*, 484.

56. An objection taken to an indictment, because it charges the offense as at common law, whilst the punishment is inflicted by statute, cannot prevail.—*McCann* v. *State*, 486.

57. The same indictment against the same individual may contain counts for several felonies of the same degree, and it is no ground for either demurrer or motion in arrest of judgment; hence, if several felonies of the same degree be included in the same indictment, and there be a general verdict, judgment may be given on any or all the counts, according as they may be supported by the evidence.—*Wash* v. *State*, 517.

58. It is an irregularity to charge distinct felonies in different counts of the same indictment. But this does not constitute a ground for a motion in arrest of judgment.—*Ib.*

59. In prosecutions for misdemeanors, where there is a general verdict of guilty, and there is any good count in the indictment, it will be referred to that and supported.—*Ib.*

60. A prosecuting attorney has the discretion to quash an indictment or enter a *nolle prosequi* at any time before the jury is empanelled and the prisoner arraigned for trial.—*Clarke* v. *State*, 530.

61. A count in an indictment charging in the usual form an assault upon a woman, and attempt to ravish, is not bad for duplicity in charging that in said attempt, the accused did forcibly choke and throw down the woman. The latter allegation is only descriptive of the assault.—*Green* v. *State*, 574.

62. Indictments upon statutes, particularly of a highly penal character, must state all the circumstances which constitute the definition of the offense, in the act. They must also be clear and certain to every intent, and pursue the precise and technical language employed in the statute in the description of the offense.—*Ike* v. *State*, 578.

63. Express malice is not an essential ingredient in the offense of assault and battery upon a white person by a slave with intent to kill. Hence it is unnecessary to allege it in the indictment or prove it on the trial—*Ib.*

64. It is essential to the validity of the indictment, that the grand jury by whom it is preferred, should not only possess the requisite qualifications, but that they should also be drawn and empanelled according to law.—*Portis* v. *State*, 583.

65. The 33d and 36th sections of the 3d article of the Penitentiary Code, Hutch. Code, 960, 961, 965, have created separate and distinct classes of offenses; and under an indictment for an assault with intent to kill and murder, a conviction for an assault with an intent to commit manslaughter cannot be sustained.—*Morman* v. *State*, 589.

66. Nor will such conviction be aided by the 22d section, article 8th, of said Code, that section relating only to that class of offenses which the statute makes to consist of different degrees; and where a conviction of a degree inferior to that charged in the indictment will be sustained.—*Ib.*

67. Where an evil intent is necessary to constitute an act a crime, it must be alleged in the indictment and proved in the same manner as any other material fact; and an allegation of shooting with intent to kill A. will not be sustained by proof of shooting with intent to kill B.—*Ib.*

68. A charge in an indictment of an assault with intent to kill and murder, is negatived by a verdict of an assault with intent to commit manslaughter, and the verdict is an acquittal of the prisoner of the offense charged in the indictment, and a bar to further prosecution for the same offense.—*Ib.*

69. Under the statute, approved March 9th, 1850, it is not necessary to allege in the indictment the name of the owner of any slave guilty of any crime punishable with death. But if the ownership is alleged, it must be proven on the trial.—*John* v. *State*, 608.

70. It is incumbent on the prosecutor to prove, on the trial, every fact and circumstance set out in the indictment which is material and necessary to constitute the offense charged. And every averment in the indictment not necessary to constitute the offence may be rejected as surplusage. But this rule does not apply to allegations, which, however unnecessary, are nevertheless descriptive of that which is material.—*Ib.*

71. It is not absolutely necessary to state in the indictment for trading with slaves, the name of the owner of the slave, but the article or commodity bought or sold must be stated; and on the trial the state should be confined in the proof of the offense to the day named in the indictment.—*Murphy* v. *State*, 618.

72. An indictment is defective in substance, when the court cannot pronounce the proper sentence of the law upon a verdict finding the accused guilty.—*Hurt* v. *State*, 645.

73. The recital in the indictment that the grand jury "was duly elected, empanelled and sworn," cannot supply the omission of it in the record.—*Abram* v. *State*, 663.

74. The authority of the grand jury to find the indictment must appear in the record, and the bill becomes no part of the record until it is acted upon and returned into open court, in the manner prescribed by law.

75. All the facts and circumstances which constitute a criminal offense must be stated with precision and certainty in the indictment. And every material circumstance in regard to time and place must be averred with sufficient certainty to exclude every other intendment.—*Riggs* v. *State*, 674.

76. It is indispensable that the indictment should aver that the murdered man died in the county in which the indictment was preferred.—*Ib.*

77. The law gives to the city of Vicksburg all the fines and license money for retailing vinous and spirituous liquors within the corporate limits. And, therefore, an indictment charging a sale within the county of Warren, is not supported by proof of a sale on a wharf-boat in the city of Vicksburg.—*Botts* v. *State*, 689.

78. As a general rule, an indictment framed under a statute must follow the precise words in charging the offense that the statute uses in its description. But where the words in the statute do not embrace every ingredient necessary to constitute the crime, the full offense must be charged by the use of such words as are necessary and proper under established rules of law to characterize it.—*Jesse* v. *State*, 739.

79. An indictment for arson must charge that the burning was done maliciously, otherwise it is defective and should be quashed.—*Ib.*

80. Every error in charging an offense which would be fatal to the indictment on general demurrer or on motion in arrest of judgment, may be urged in error, and is ground for reversal.—*Ib.*

81. To prepare poison with intent to kill a person, and the crime of administering such poison for a like purpose, are two different offenses. Yet there can be no objection to

an indictment on the ground that these two offenses are charged in it against the same person.—*Sarah* v. *State*, 750.

82. In England it is held to be irregular where two distinct felonies are charged in the same indictment, but in the United States the courts have held that distinct felonies of the same character, though differing in the degree of punishment, may be charged in the same indictment against the same person.—*Ib.*

83. The words "persons in this state" in the statute against poisoning, were intended to designate the jurisdiction of the offense, and not as descriptive of the persons against whom the crime might be committed. And an indictment not alleging that the person attempted to be poisoned was "a person of this state," is not deficient on that ground.—*Ib.*

84. In order to show that the alleged act of administering the poison came within the meaning of the statute, it is essential to allege the manner in which the poison was administered.—*Ib.*

85. The word "administer" used in the statute, does not mean that the article given in order to effect the felonious intent, must be given under the pretense that it is a medicine. The intention of the legislature was to punish any preparation, giving or administration of any substance known as a medicine, with intent to kill.—*Ib.*

86. The compelling the prosecutor to elect which count of the indictment on which he will proceed, is a matter in the discretion of the court, and a refusal to do so is no ground of reversal.—*Ib.*

87. In an indictment for a statutory offense, it is sufficient to describe the offense in the words of the statute. But this rule can only apply in cases in which there is a sufficient description of the offense intended to be created by the legislature.—*Ib.*

88. In all cases of felony in which malice is the gist of the offense, malice must be averred in the indictment, otherwise it will be defective and the judgment arrested on motion.—*Ib.*

89. As a general rule, every material averment in the indictment must be proved; but it is unnecessary to prove the offense to the whole extent charged. It is sufficient to prove so much of the indictment as to show that the accused has committed the offense charged.—*Murphy* v. *State*, 765.

90. Under the statute of 1822, Hutch. Code, 314, where a person receives a wound in one county and dies in another county, the indictment should be preferred in the county where the death occurs; and it must be proven that deceased did die in the county where the indictment is found.—*Turner* v. *State*, 785.

91. The record must show that the indictment on which the prisoner was tried was found and returned into court by the grand jury.—*Jenkins* v. *State*, 810.

92. In an indictment against a slave for an attempt to commit a rape upon a free white woman, it is unnecessary to state that such slave is a negro or mulatto,—such an averment would be immaterial, and need not be made, but if made, it must be proved.—*Dick* v. *State*, 842.

93. The rule is clearly settled, that it is incumbent on the prosecutor to prove on the trial every fact and circumstance stated in the indictment, material or necessary to constitute the offense charged; but those allegations in the indictment which are not necessary ingredients in the offense, may be rejected as surplusage, and need not be proved.—*Ib.*

94. If an averment may be entirely omitted without affecting the charge against the prisoner, it may be considered as surplusage, and be disregarded in the evidence. This rule applies to averments which are not only unnecessary in themselves, but foreign to the charge; but it has not been held to apply to allegations which might have been properly dispensed with, but being inserted in the indictment, are descriptive of the identity of that which is legally essential to the charge.—*Ib.*

95. The averment that the accused was a negro was wholly unnecessary, but having been made, it was descriptive of the person of the prisoner, and became a part of his identity, as much so as the name by which he was indicted.—*Ib.*

96. An indictment under a statute must pursue the words of the statute, and aver all the facts and circumstances necessary to constitute the offense.—*Scott* v. *State*, 886.

97. Under the constitution, "in all criminal prosecutions, the accused hath the right to demand the nature and cause of action against him." And this right so secured requires that the facts which constitute the alleged crime, should be stated in the indictment with sufficient certainty to enable the accused to know with what offense he is charged, and to prepare his defense, both by plea of not guilty and of former conviction or acquittal.—*Norris* v. *State*, 1059.

98. An indictment under the statute, Hutch. Dig., § 4, p. 981, which provides that "every person who shall feloniously steal the property in another state or country, and shall bring the same into this state, may be convicted and punished in the same manner as if such larceny had been committed in this state," &c., must allege the stealing in such other state or country, and a bringing of the property into this state; otherwise it will be defective, and should be quashed. HANDY, J., *dissented*.—*Ib.*

99. If the indictment merely charges the accused with a felonious stealing of property in the county in which it is preferred, he cannot be convicted of an offense under the fourth section of the act (Hutch. Dig., 981), because the indictment does not sufficiently charge the offense. Such indictment does not give the accused "the nature and cause of the accusation against him," and precludes him from pleading a former conviction or acquittal in the state or county where the property was stolen. HANDY, J., *dissented*.—*Ib.*

100. Where the record states that the indictment was returned on the 4th of November, during the *October* term, and the indictment appeared on its face to have been found at the *November* term, and nothing in the record identified the indictment on which the indictment was had, a motion in arrest of judgment should be sustained.—*Hagus* v. *State*, 1081.

101. The court has no power to amend an indictment as to matter of substance without the concurrence of the grand jury by whom it was found, though amendments as to mere informalities may be made by the court.—*McGuire* v. *State*, 1097.

102. The time charged in an indictment for unlawful retailing, is not essential to or descriptive of the offense, and is therefore immaterial except under plea of limitation.—*Miassa* v. *State*, 1205.

103. Other indictments of like import pending against same party, will not be allowed to sustain a motion in arrest of judgment. He must plead to those indictments, and may set up his former conviction or acquittal.—*Ib.*

104. The sufficiency of a pending indictment, which has been adjudged sufficient in the circuit court, cannot be inquired into on *habeas corpus*. That judgment, until set aside, is the law of the case. But the evidence on which the indictment was found may be adduced, and if it appear that accused should not be held in custody, he may be discharged.—*Emanuel et al.* v. *State*, 1217.

105. Under the statute, Rev. Code, 615, art. 262, the indictment may be amended by striking out certain descriptive words from it.—*Rocco* v. *State*, 1280.

106. If the offense charged against a party in a second indictment *be identical* with an offense charged against the same party in a previous valid indictment, upon which he was tried and convicted or acquitted, that judgment will be a bar to the second indictment; and it will be presumed that all the evidence that could be adduced in support of the former indictment was adduced on that trial.—*Ib.*

107. But in order to render a formal acquittal or conviction successful, it is necessary for the defendant to show *the record* of the former proceedings and conviction, and prove *the identity of the offense* and of the *person* charged in the two indictments.—*Ib.*

108. Where a former indictment charged the defendant with retailing spirituous liquors to *John Smith*, and he was subsequently indicted for retailing to John Hobart, a plea of *autrefois acquit* under the first indictment is not sufficient to bar his conviction under the second.—*Ib.*

109. Art. 7, p. 573, of the Rev. Code, which provides that all objections either to the form or substance of an indictment shall be made before verdict, applies to those cases

only where the defect is of such character that the accused may waive it, either expressly or by his silence.—*Newcomb* v. *State*, 1303.

110. The right secured to the accused by the 10th section of article 1 of the constitution of this state, "to demand the nature and cause of the accusation against him," cannot be waived or surrendered by him; and hence, if the indictment do not contain such a description of the offense as to give him the nature and cause of the accusation against him, it is a nullity, and may be objected to at any time.

111. The means and manner of the commission of the crime of murder are not necessarily embraced in a description of the "nature and cause of the accusation," in the sense of the constitution of this state; and hence article 256, p. 616, of the Rev. Code (which provides that "in an indictment for homicide, it will not be necessary to set forth the manner in which, or the means by which, the death of the accused was caused; but it shall be sufficient to charge in an indictment for murder that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased"), is not in conflict with the 10th section of the bill of rights, and an indictment framed under it is valid.

112. An indictment that charges the accused with "wilfully and maliciously placing an obstruction on" a certain railroad named, "which obstruction was of such a nature as to endanger the lives of persons being carried on said road," is sufficient under the Rev. Code, p. 600, art. 164.—*McCarty* v. *State*, 1330.

113. The day on which an offense is charged to have been committed is immaterial, except in those cases where time is of the essence of the offense, or a necessary ingredient in its description; and hence in a case not within the above exception, proof that the offense was committed either before or after the day laid in the indictment, but before the indictment was found, and within the period prescribed by the statute of limitations, is sufficient.—*Ib.*

114. If an indictment against several persons charge them with the commission of several and distinct offenses, and not with the joint commission of the same offense, it seems that the defendants are competent witnesses for each other, before acquittal or conviction.—*Strawhern* v. *State*, 1338.

115. In prosecutions for gaming, it is essential that it should be alleged and proven that the defendants had wagered or bet money, or something of value, either directly or indirectly, or that they had, in some way, an interest in the game, and would, by the result, either gain or lose.—*Ib.*

116. It is settled by the courts, both in this country and England, that in point of law there is no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender.—*Ib.*

117. Where the indictment contains two counts, each charging a distinct offense, the defendant has no right to compel the prosecutor to elect upon which count he will proceed; it is a matter within the sound discretion of the court.—*Ib.*

118. In point of law there can be no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender. And if the joinder of more than one distinct felony in the same indictment be objected to before plea, the court should quash the indictment. But this is a matter within the discretion of the court, and not necessarily a right of the accused. *Semble*, that such objection cannot be made after plea of not guilty.—*George* v. *State*, 1404.

119. The following entry on the minutes of the court: "The grand jury, elected, empanelled, sworn, and charged at the present term of the court, this day returned into court the following bill of indictment:

THE STATE,	*Indorsed:*
178 vs.	A true bill. James B. Smith, foreman of the grand jury.
JOSEPHINE (a slave),	
GEORGE (a slave).	No Prosecutor."

is sufficient to show that an indictment for murder, marked "filed," by the clerk, against the above named parties, and numbered and indorsed as above, was legally returned into court by the grand jury.—*Josephine* v. *State*, 1439.

120. All objections to the indictment must be made before plea of "not guilty." Then, after the plea of not guilty has been entered, it will not be error for the court to refuse to quash an indictment for misjoinder of counts, or to refuse to compel the state to elect which count upon which to try the prisoner.—*Ib.*

121. The statute, Rev. Code, 250, which provides that in all cases not capital, slaves shall be tried by two justices of the peace and five slaveholders, does not apply to capital cases.—*Ib.*

122. Rev. Code, 44, art. 6, provides that no indictment pending before the adoption of the Code should be affected by its provisions not in force before its adoption. Therefore, art. 2, p. 572, of the Code, which provides that "every person who shall be an accessory to any murder or other felony before the fact, shall be deemed and considered a principal, and indicted and punished as such, and this whether the principal has been previously convicted or not," does not apply to cases where the indictment was found before the adoption of the Code.—*Ib.*

123. The rule is well settled at common law, that when in an indictment for murder a person is charged as principal, the jury cannot convict such person as accessory before the fact.—*Ib.*

124. In all indictments for felony, it is necessary to charge that the offense was committed "feloniously."—*Bowler* v. *State*, 1515.

125. The Rev. Code, 630, art. 857, which provides "that offenses at common law indictable and punishable by statute, may be indicted, and described or charged according to the common law or statute; and on conviction shall be punished as prescribed by statute," etc., does not apply where the grade of the felony—where the grade of the common law offense—has been increased by statute from a misdemeanor to a felony, the misdemeanor being merged in the felony.—*Ib.*

126. All indictments upon statutes must pursue the precise and technical language employed in the statute in the definition or description of the offense.—*Williams* v. *State*, 1557.

127. An indictment for an assault and battery with intent to kill and murder, must state that the offense was committed with a deadly weapon, or other means or force likely to produce death.—*Ib.*

128. Where the owner of the goods cannot be ascertained, the indictment laying them to be the property of some person unknown will be valid. But if the owner is known, such an allegation will be improper; and, on the discovery of his name on the trial, the prisoner will be acquitted. Wherever the name of the party is known, it is absolutely necessary to insert it in the indictment, and the entire Christian name as well as the surname of the party must also be inserted.—*Unger* v. *State*, 1584.

129. To sustain an indictment for larceny, it must be proved that the goods alleged to be stolen are the absolute or special property of the person named as owner in the indictment, and that the offense has been committed.—*Ib.*

130. The right and power to amend an indictment for a felony in a material matter, after the expiration of the term of court at which it is found, and without the consent of the accused, is questionable.—*Ib.*

131. There is no partnership in crime, and hence it is not necessary to allege, in the indictment, that several committed an offense as partners. So, under this statute, it is immaterial whether the liquor was sold by the defendant, or by his servant, or partner, with or without his knowledge or assent; having an interest in the liquor sold, he is indictable whether he assented to or knew of the sale or not.—*Gathings* v. *State*, 1638.

132. The general rule stated in several cases (5 How., 242; 13 S. & M., 263; 23 Miss., 525), that "indictments on statutes must state all the circumstances which constitute the definition of the offense in the act; that they must pursue the precise technical language employed in the statute defining the offense," is a little too broad and general. Art. 7, Rev. Code, 573, supplies a rule of absolute force. "Merely formal and technical words shall not be deemed necessary (in indictments), so the offense be certainly and substantially described therein;" and the indictment would be good, although the "precise, technical language of the statute" be omitted, provided the

offense is "certainly and substantially" described in other words of equivalent import.—*Kline* v. *State*, 1695.

183. Where the enacting clause of the statute describes the offense with certain exceptions, it is necessary to state all the circumstances that constitute the offense, and to negative the exceptions; but if the exceptions are contained in a separate clause of the statute, they may be omitted in the indictment, and the defendant must show that his case comes within them, to avail himself of their benefit.—*Ib.*

184. The indictment omitted to negative the exception by inserting the words, "not being a druggist or apothecary," as contained in the enacting clause of the statute; this negation being material, the statute does not authorize the court, at a subsequent term, to allow an amendment by inserting the words of the exception.—*Ib.*

INSANITY.

See *Evidence.*

1. Instructions given to the jury as follows: 1. The law presumes every man to be sane, until the contrary is proven. 2. That if the jury believe, from the evidence, that the accused killed the deceased with malice, and not in necessary self-defense, he is guilty of murder, notwithstanding they may believe he was, at the time of committing the deed, laboring under partial insanity, unless he was, from such insanity, incapable of understanding the nature and consequence of his act, and of knowing that it was wrong, and that he would be punished for it. 3. That insanity, however produced, constitutes no excuse for crime, unless it be so great as to deprive the party of his power to understand the nature of his act, or of his ability to distinguish between right and wrong, and of his ability to understand that he will be liable to punishment if he commits it. 4. That though a party be partially insane, yet he is responsible for his criminal acts, unless it appear that he was prompted or instigated by his madness to perpetrate such act. 5. That if the homicide charged is proven in the opinion of the jury, the barbarity of the act affords no legal presumption of insanity in the accused. *Held*, that these instructions correctly expounded the law in regard to insanity, as a defense for crime.—*Bovard* v. *State*, 818.

2. If it be established by the legal evidence that the accused committed a criminal offense, it will be presumed that it was done by a sound mind; and that presumption is not overcome by the probability that the accused is insane. In order to establish a defense on the plea of insanity, it must be clearly proved.—*Newcomb* v. *State*, 1304.

INSTRUCTIONS.

1. It is a well established rule of law, that a hypothetical opinion of the court, given in its instructions to the jury, is no ground of error.—*Kliffield* v. *State*, 150.

2. Where, it being in evidence that the deceased came to his death by means of the discharge, by the accused, of a shot-gun loaded with duck-shot, the court was asked to charge the jury, "That if they believed, from the evidence, that the deceased came to his death by means of the shot aforesaid, and not by one leaden bullet discharged from said shot-gun, as alleged in the bill of indictment, they must find for the accused," and the court refused to give said charge, but did charge the jury, "That the said proof was sufficient to sustain the said bill as alleged in said indictment," the court properly refused to give said charge, and was clearly justified in the one which was given, as it referred solely to the proofs of the contents of the shot-gun, and was not intended as a charge generally upon the evidence.—*Goodwyn* v. *State*, 257.

3. Where, on the trial of a prisoner for murder, the court charged the jury that "every homicide is presumed to have been committed with malice aforethought, and it devolves on the prisoner to prove the circumstances which excuse the act;" the charge was held to be too broad and unrestricted; that it should have been qualified by adding, "unless they arise out of the evidence produced against him."—*McDaniel* v. *State*, 336.

4. Instructions containing only mere propositions of law, when refused by the court, is no ground of error.—*Ib.*

5. Instructions couched in the language of the statute are proper, and should be given.—*Boles* v. *State*, 397.

6. On a trial for murder it is material to instruct the jury what, under the law, constitutes murder.—*Ib.*

7. The circuit judge is not bound to give instructions in the precise language as asked by counsel. He may modify them so as to make them conformable to his own views of the law.—*Ib.*

8. The judge of the circuit court has a right to modify instructions asked by counsel, so as to make them conform to his own view of the law. And if a party object to such modifications, he must embody them in his bill of exceptions.—*Keithler* v. *State*, 403.

9. The charge or modification must be in writing, unless by consent of the parties to the contrary; and, in the absence of any objections on the record, such assent will be presumed.—*Ib.*

10. It is well settled that it is competent for the circuit judge, in criminal prosecutions, as well as in civil cases, to modify the instructions requested on either side, so as to make them conform to his own views of the law.—*Cicely* v. *State*, 435.

11. The high court of errors and appeals cannot notice the instructions given or refused in the court below, unless they are embodied in a bill of exceptions.—*Stoughton* v. *State*, 460.

12. An instruction that charges the jury that if the offense did not amount to murder, but only to manslaughter, and was committed more than a year before the finding of the indictment, they must acquit the defendant, is correct, and should be given.—*Howard* v. *State*, 465.

13. Instructions granted for the state, not excepted to at the time they were given, nor made grounds for a new trial, will not be considered on error to the high court of errors and appeals.—*Bond* v. *State*, 469.

14. The statute which requires the clerk to put down the charges given or refused, and make them a part of the record, does not apply to criminal cases, except when they are embodied in the bill of exceptions.—*Cain* v. *State*, 481.

15. In criminal prosecutions no alleged error in the instructions to the jury will be noticed, unless they are embodied in the bill of exceptions, and thus made a part of the record.—*Wash* v. *State*, 517.

16. It is proper for the court to modify instructions as asked by counsel, so as to make them conform to his own views of the law, yet, it is the safer rule, to give instructions as asked by the accused, provided the court believes them to be the law, and if any explanations are necessary, to give them afterwards.—*Lambeth* v. *State*, 582.

17. Charges given or withheld by the court, in criminal cases, are not necessarily a part of the record. Hence, they will not be noticed by the appellate court unless they are embodied in a bill of exceptions. But papers, which are not legitimately parts of the record, when transcribed into the record, and referred to by counsel, in his bill of exceptions, will be noticed, when there is no doubt of their identity.—*Preston* v. *State*, 650.

18. Although it has been held that sec. 2 of the act prohibiting trade and barter with slaves, which dispensed with the averment and proof of the kind of produce or commodity bought or sold, is invalid under sec. 2 of the bill of rights, yet, an indictment under this statute containing the necessary averments, is valid, and should be sustained.—*Murphy* v. *State*, 765.

19. The court may modify instructions asked by either party before giving them to the jury. The phrase "great personal injury" in our statutes is equivalent to "*great or* enormous bodily harm," or danger of loss of life or limb.—*Green* v. *State*, 788.

20. A court in this class of cases should never give to the jury any instructions which, even by remote construction or bare possibility, may limit or cramp the free action of the jury in considering the evidence before them.—*Cotton* v. *State*, 915.

21. If incorrect instructions be asked, the court may modify or correct them before giving them to the jury. But if correct, and asked, they should be given without modification or amendment.—*Ib.*

22. The high court of errors and appeals refuse to revise the action of the circuit court in giving or refusing instructions asked in a criminal case, because the instructions, being no part of the record, were not made so by exceptions tendered at the trial.—*Haynie* v. *State*, 943.

23. Erroneous instructions to the jury in a criminal case are no ground for reversal of the judgment unless excepted to in the court below.—*Brown* v. *State*, 974.

24. The court is not bound to instruct the jury in mere abstract propositions of law, which would mislead rather than enlighten the jury.—*Browning* v. *State*, 991.

25. A verdict of guilty of manslaughter will not be set aside for an error in the court below in refusing to give instructions asked for by the prisoner, the object of which was to reduce the crime from murder to manslaughter.—*Ogle* v. *State*, 1069.

26. Every instruction which has not some particular application to the issue before the jury should be refused.—*Beason* v. *State*, 1075.

27. Though one of several instructions, taken by itself, may have been erroneous, yet, if taken in connection with all the others, the law be, on the whole, correctly expounded, the judgment will not be reversed.—*Mask* v. *State*, 1100.

28. The circuit judges have a right, in proper cases, to modify instructions asked.—*Ib.*

29. Instructions are not a part of the record; and unless they are embodied in a bill of exceptions, they will not be noticed on error.—*Price* v. *State*, 1168.

30. The fact that the court gave instructions to the jury in behalf of the state, on its own motion, is no ground of error.—*Thomas* v. *State*, 1276.

31. The refusal of the circuit court to grant instructions containing mere abstract propositions of law, cannot be assigned as error.—*McGuire* v. *State*, 1291.

32. The giving of an instruction philologically inaccurate, but substantially correct, is no ground of error.—*Oliver* v. *State*, 1374.

33. An instruction, although it charges the law correctly, being wholly inapplicable to the evidence, should be refused, and it is error in the court to give it.—*Ib.*

34. The giving of an instruction which assumes as proven facts which are not proven, is erroneous.—*Ib.*

35. Where an instruction which is erroneous is given upon a material point in the cause, a judgment rendered in accordance with it will be reversed, unless it manifestly appear from the whole record that no prejudice was done to the party complaining, and that the judgment was clearly correct. *Semble:* Especially in cases of circumstantial evidence is this rule applicable.—*Josephine* v. *State*, 1439.

36. Instructions, though correct as abstract propositions of law, not applicable to the testimony, should be refused.—*Frank* v. *State*, 1474.

37. An instruction that assumes that statements made by an accused are a confession of his guilt is erroneous. It is for the jury to determine, upon consideration of his whole statements, whether or not they show guilt, and that is a matter entirely for their determination.—*Hogsett* v. *State*, 1505.

38. An instruction which assumes the grade and weight of a supposed confession is erroneous. It is the duty of the court to admit the evidence, and to tell the jury that it is competent evidence to be considered by them; and this is the whole extent of the power of the court over the matter.—*Ib.*

39. Instructions should have reference to the facts in evidence, and lay before the jury the law applicable thereto; and if the conviction is right on the evidence, and the jury could not have been misled by the instructions to the prisoner's prejudice, looking to the tenor of all the instructions, then the verdict ought not to be disturbed; and it is only when it appears by the whole record that injury has been done or may have been done the defendant, that the court will interfere to correct the error.—*Durrah* v. *State*, 1668.

40. The verdict of the jury will not be disturbed for any supposed error in the instructions, where it is manifestly right on the evidence; and it does not appear that the defendant was prejudiced by any one of the charges of the court. Nor is it error to refuse instructions asked, where the true principles of law applicable to the case are embraced in those already given.—*Head* v. *State*, 1700.

JEOPARDY.

See *Former Acquittal and Conviction.*

1. Even in capital cases, when a striking necessity exists, the jury may be discharged.—*Moore* v. *State*, 13.
2. The clause in the constitution of the United States, "Nor shall any one be subject for the same offense to be twice put in jeopardy of life or limb," is binding in the courts of the states, as well as of the United States. Under this clause in the constitution, the prisoner is not put in jeopardy till after verdict.—*Ib.*
3. The power to discharge the jury is a matter within the sound discretion of the court, to be exercised whenever the ends of public justice require it; and such discharge will not bar a subsequent trial and conviction. Hence, where, at a former term, the jury disagreed, and were discharged by the court, it is no ground of error.—*Price* v. *State*, 1168.
4. The constitutional rule, that no person shall be twice put in jeopardy of life or limb for the same offense, means that he shall not be again tried for the same offense, after he has been once convicted or acquitted.—*Ib.*
5. Where the reasons and circumstances upon which the court discharged the jury do not appear, it will be that it was done legally.—*Ib.*
6. The constitutional rule which declares that "no person shall, for the same offense, be put twice in jeopardy of life or limb for the same offense, applies only to those cases where there has been had either a lawful acquittal or a lawful conviction, under a valid indictment, which is sufficient in law to authorize the court to pronounce its judgment. —*Kohlheimer* v. *State*, 1388.
7. If the indictment be so defective in form that a valid judgment could not be pronounced upon it against the defendant, he has not been in jeopardy; and if acquitted, the acquittal would be no bar to another prosecution for the same offense.—*Ib.*
8. An acquittal or conviction (where the penalty has not been inflicted) upon a void proceeding or indictment, will not operate as a bar to the subsequent indictment. *Semble*—That where the penalty has been inflicted it is different.—*Ib.*

JUDGE.

1. Under the constitution of 1832, and the laws in force in 1855, the governor of this state had power to fill vacancies in the office of circuit judge by temporary appointment, till the election and qualification of a judge should occur; and this, although the unexpired term exceeded one year, and no special election had been ordered. Per HANDY, J.—*Sam* v. *State*, 893.
2. Judicial districts may be so changed by law as practically to transfer the judge to another district.—*Mianza* v. *State*, 1205.
3. Where the prisoner had been tried and convicted at the June term of the criminal court, and for some cause, sentence of the law was delayed till the next term, and in the meantime, one of the counsel who had assisted the state on the trial, had been elected judge of said court, there is no legal objection to his sitting as judge in the case, and pronouncing the sentence of the law upon the prisoners, whatever may be the propriety or impropriety of such action. The objection is one which cannot be raised and adjudicated in this court.—*Thomas* v. *State*, 160.
4. The judges of the courts of this state, by the constitution, by virtue of their offices, are conservators of the peace. And within the duties and powers of general conservators of the peace is included the power to commit all breakers of the peace, or to bind them in recognizance to keep it, or to answer for offenses committed against it.—*Wofford* v. *State*, 417.

JUDGMENT.

1. W. was convicted of murder in the circuit court, but owing to some cause not appearing of record, sentence was not executed. At a subsequent term of the

court, certain proceedings were had in the case. *Held*, That errors in the subsequent proceedings cannot affect the validity of the judgment previously entered against the prisoner.—*Woodsides* v. *State*, 95.

2. Where the statute creates several degrees of the same offense, and graduates the punishment according to the degrees, the verdict must designate the degree, or else no judgment can be pronounced.—*Thomas* v *State*, 160.

3. When the parties have agreed to consider a plea as filed, and issue as joined, it is error to render judgment by default.—*McEwin* v. *State*, 282.

4. A judgment upon a *scire facias* which does not recite the original judgment correctly, is erroneous.—*Bridges* v. *State*, 592.

5. The judgment of a court of competent jurisdiction, acting within the scope of its jurisdiction, is binding upon all the world until its judgment has been reversed or set aside by itself or some superior tribunal having authority for that purpose.—*Adams ex parte*, 665.

6. A judgment *nisi* is not final until rendered so by judgment upon the *scire facias*, and it is competent in determining upon the latter judgment, to consider whether the *scire facias* is supported by the judgment *nisi*, which it is merely process to complete and render final.—*Douthit* v. *State*, 809.

7. If the judgment *nisi* and the *scire facias* are insufficient to sustain the final judgment, it will be erroneous and must be reversed, though no objections were made in the court below.—*Ib.*

8. A variance between the judgment *nisi* and the *scire facias*, is fatal to the *scire facias* and the final judgment.—*Ib.*

9. Judgment *nisi* against a sheriff for failing to return a bench warrant is void if entered without notice.—*Jenkins* v. *State*, 1068.

10. An incomplete, defective, or void judgment at one term of the court upon a verdict of guilty may be treated as a nullity, and the proper judgment and sentence rendered and entered at the next term; and until the proper judgment and sentence shall be so made, the defendant will be regarded as continuing in custody of the law.—*Easterling* v. *State*, 1086.

11. A writ of error will not lie where there has been no judgment pronounced by the court below, not even where a judgment of imprisonment has been pronounced, and no term of imprisonment has been fixed.—*Wharton* v. *State*, 1527.

12. On a writ of error, where no judgment has been pronounced, the prisoner will be remanded to the court below for the proper judgment.—*Ib.*

JURISDICTION.

1. The county court was a court of general jurisdiction for the trial of slaves. The jurisdiction of a court of general jurisdiction will be presumed until the contrary appear; that of a court of limited jurisdiction must be made to appear by the record. The record of the county court showing the conviction of the principal of murder, may be properly admitted on the trial of the accessory, as evidence of the guilt of the principal.—*Byrd* v. *State*, 45.

JURY.

1. On an indictment for grand larceny, the jury not being able to agree, up to the last moment, when the term of the court ceases by limitation of law, may be discharged without the consent of the accused, and he may be lawfully remanded to jail for trial at the next term of the court.—*Moore* v. *State*, 13.

2. Even in capital cases, when a striking necessity exists, the jury may be discharged.—*Ib.*

3. The clause in the constitution of the United States, "Nor shall any one be subject for the same offense to be twice put in jeopardy of life or limb," is binding in the courts of the states, as well as of the United States. Under this clause in the constitution, the prisoner is not put in jeopardy till after verdict.—*Ib.*

6. A juror cannot be asked, either by the state or the accused, whether he has formed or expressed an opinion as to the guilt or innocence of the prisoner before he is challenged.—*State* v. *Flower*, 24.

5. A hypothetical opinion, or one formed upon rumor, subject to be changed by the evidence on the trial, does not disqualify a person from serving as juror in the case.—*Ib.*

6. A juror being examined on his *voir dire*, was asked, "Have you formed an opinion as to the guilt or innocence of the prisoner at the bar?" Answer, "I have." "Have you formed or expressed that opinion from common report, or from the witnesses, or either of them?" Answer, "From common report only. I have never heard any of the witnesses say anything on the subject." "Will anything you have heard respecting the prisoner, have any influence on your mind, as a juror, in determination of this cause?" "It will not. I feel free to decide the case according to the evidence which may be produced on the trial." *Held:* such an individual is a competent juror.—*State* v. *Johnson*, 32.

7. It is not necessary, to exclude a juror, that he should have formed and expressed his opinion against the accused, with malice or ill-will; but a mere hypothetical opinion, from rumor only, and subject to be changed by the testimony, does not disqualify.—*Ib.*

8. If a juror has formed a fixed opinion, he ought to be excluded, though he may never have expressed that opinion.—*Ib.*

9. It is necessary to the competency of jurors that they shall be freeholders or householders, but no length of citizenship is required. The qualification of jurors to serve on a special *venire*, are the same as those for the regular *venire*. If a juror declare on his *voir dire* that he is neither a freeholder nor a householder, it is ground of challenge for cause.—*Byrd* v. *State*, 45.

10. Although the constitution is silent as to the number and qualification of jurors, yet it recognizes the number twelve, as known at common law, and although the legislature cannot abolish or substantially change the jury, it can prescribe the qualification of those who compose it.—*Ib.*

11. By the statute, the panel of jurors is to be drawn in term time, or in vacation, and a *venire* is directed to be issued, returnable to the next term. The grand jury is to be drawn from the number appearing; the balance are to be sworn as petit jurors for the term. These jurors were not intended exclusively to form the panel for the trial of criminal cases.—*Shaffer* v. *State*, 65.

12. The statute points out the method by which those who are to compose the panel shall be selected, and prescribes their qualifications; and it will be presumed that the court intrusted with this duty has performed it, by placing on the panel none but such as are good and lawful men of the county, in accordance with the provisions of the act. The party can only rebut this presumption by challenge and proof before trial. The question cannot afterwards be raised in another court.—*Ody* v. *State*, 107.

13. Where a juror, upon being interrogated by the court, "denied that he had formed or expressed any opinion of the prisoner's case;" and it was proved that, after he had been summoned by the officer to attend as a juror, he had said that, if he should be on the jury, "he did not think he could clear him, but should be bound to find him guilty," he was held to be clearly incompetent as a juror, and a new trial ought to be granted on that ground.—*Ib.*

14. Where, by the assent of the accused and the state, entered on the record, the jury were allowed by the court to bring in a sealed verdict and deposit it with the clerk, and to separate until a certain day; and they did so, and appeared on the day named, when their verdict was opened by the clerk and read to them, and they "severally, upon their oaths in open court, confirm their sealed verdict," and say, "We the jury find the prisoner guilty in manner and form, as he stands charged in the bill of indictment," the conviction was held to be regular and valid. And where the judge directs the jury to bring in a sealed verdict, and gives them permission to separate after agree-

ing on the same, the parties will be deemed to have assented to such permission, if no objection appear, and it is no cause of objection to the verdict.—*Price* v. *State*, 114.

15. At common law, the number of the jury, for the trial of all issues involving the personal rights and liberties of the subject, cannot be less than twelve. In all cases where the term "jury" is used in our statutes, it is regarded as one of fixed and determined meaning, ascertained by the paramount law. A trial and conviction by a jury of less than twelve is therefore a nullity.—*Carpenter* v. *State*, 126.

16. Where a person who was not a sworn officer was permitted to go into the jury-room after the jury had retired to make up their verdict, in a capital case, and to have charge of them in the absence of the bailiff, it was held a sufficient ground for a new trial.—*Hare* v. *State*, 133.

17. The well established rule is, that whenever the circumstances of irregularity attending the deliberations of a jury *might* have affected the correctness or purity of the verdict, the verdict cannot be sustained; on the contrary, where those circumstances could *not* have influenced the jury in its determination, the verdict shall stand.—*Ib.*

18. Mere impressions as to the guilt or innocence of the prisoner do not disqualify one as a juror. To *disqualify*, the juror must have formed and expressed an opinion, or have such acknowledged prejudice or bias, as would render him incapable of doing justice, according to the evidence, between the state and the accused.—*State* v. *Neal*, 153.

19. Since the passage of the act of 1836, to amend the jury laws, no challenge to the array shall be sustained, nor shall any *venire facias* be quashed by any court of justice in this state, for any cause whatsoever, except for corruption in the officer who may summon the jury.—*Thomas* v. *State*, 160.

20. Since the passage of the act of 1836, regulating the proceedings in criminal cases, the special *venire facias* in criminal cases will not be quashed for any cause, except for partiality or corruption of the officer summoning the jury by virtue of such special *venire facias*.—*King* v. *State*, 189.

21. A juror who, being sworn and challenged, answered that he had formed an opinion with regard to the guilt or innocence of the prisoner, from rumor only, and that his mind was free to act upon the testimony that might be adduced before him, is competent.—*Ib.*

22. A juror must be sworn and challenged before he can be interrogated as to his competency as a juror.—*Ib.*

23. If there be a deficiency of jurors present, summoned by virtue of said *venire facias*, it is competent for the court to order the sheriff to summon others from the by-standers until the jury is completed.—*Ib.*

24. The statute, authorizing the parties in a suit to select a member of the bar to preside in civil cases, when the presiding judge has been interested in the cause, does not apply to criminal cases.—*Peter* v. *State*, 208.

25. It is sufficient if the record shows that the jurors, who tried the defendant, were summoned by the deputy sheriff, his acts as such deputy being, in legal effect, the acts of the sheriff; and it cannot be objected to the verdict that the court *dismissed* the sheriff from the duty of summoning *talis* jurors, as such order or action of the court would be null and void.—*Kelly and Little* v. *State*, 235.

26. The statute (How. & Hutch., 672, § 46), which limits the number of peremptory challenges in capital cases, on the part of the prisoner, to twelve, is not an infringement of that clause of the constitution which provides, "that the right of trial by jury shall remain inviolate."—*Dowling* v. *State*, 260.

27. "Trial by jury" means a trial by twelve free and lawful men, of kin to neither party, for the purpose of establishing, by their verdict, the truth of the matter in issue between the parties; and legislation which merely regulates the mode of attaining this object, and does not take from it any of its essential attributes, will not be considered as infringing on that right.—*Ib.*

28. When a juror is elected, he must remain under the charge of the court or an officer before, as well as after he is sworn, and it is error to permit the jury to disperse with-

out the consent of the prisoner. And it is immaterial whether improper influence have been exerted or not.—*McQuillen* v. *State*, 358.

29. Although the rule was formerly different, the court now possesses the power to excuse a juror, when he states voluntarily, without being asked, "that he had conscientious scruples against capital punishment." The rule is, that the court may set aside incompetent jurors, at any time before evidence is given.—*Lewis* v. *State*, 382.

30. The conduct of a juror, in conversing, writing, and receiving notes from a third person not of the jury, during the progress of the argument of the prisoner's counsel, even when his affidavit is read in excuse, is very reprehensible, and improper.—*Ib.*

31. An officer of the court should always be placed over the jury, to prevent any one from having any communication with them; and when they depart from the bar they should be attended by a bailiff sworn for that purpose. But it is not unusual that officers are sworn at the commencement of the term for that purpose.—*McCann* v. *State*, 399.

32. If the irregularity in a jury has a tendency to affect the rights of parties, their verdict must be set aside. The evil to be guarded against is improper influence, and when an exposure to undue influence is shown, and it is not shown that it failed of effect, then the presumption is against the purity of the verdict.—*Ib.*

33. Where the jury for a portion of the time during the trial, and after retirement, were not under the care and charge of proper and sworn officers of the court, or bailiffs sworn for that purpose, would be error beyond controversy.—*Ib.*

34. Irregularity in the jury is not proper ground for a motion in arrest of judgment.—*Ib.*

35. The statute of this state (H. & H., 490, § 44) requires, among other qualifications of jurors, that they should be either freeholders or householders.—*Barney* v. *State*, 426.

36. The belief of a juror that he can do justice can have but little influence in determining his competency. The presumption of law is against his competency, when a decided opinion as to the guilt or innocence of the prisoner has been formed.—*Sam* v. *State*, 430.

37. If a defendant knows of a want of qualification of a juror at the time he is sworn, he waives all objection by failing to challenge him at that time. If he does not know it, he should make an affidavit of the fact on his application for a new trial.—*Seal* v. *State*, 473.

38. Where the court, without the consent of the parties interested, excuses a competent juror on account of the sickness of his wife, it is an unwarrantable exercise of power by the court, and sufficient grounds for a new trial.—*Boles* v. *State*, 476.

39. Where a person who was not a sworn officer, is allowed to go into the jury-room during the trial, or after the jury having retired to consider their verdict, it is a good reason for a new trial.—*Ib.*

40. When a jury is shown to have been *exposed* to improper influence, it is sufficient; and it is unnecessary to show that improper influence was exercised.—*Ib.*

41. It is generally conceded that an opinion formed or expressed on common rumor does not disqualify a juror. But if an opinion be formed and expressed on information derived from a reliable source, the juror is objectionable. An opinion from having heard the evidence, or from having conversed with the witnesses, is of that nature.—*Nelms* v. *State*, 509.

42. A juror may be received to testify to any improper conduct of the officer who has the jury under his charge.—*Ib.*

43. A prisoner indicted for a capital offense, has an unquestionable right to select his jury from the whole number of those summoned by virtue of the special *venire facias*, and of whose names a list had been furnished to him, provided a sufficient number could be regularly obtained therefrom.—*Boles* v. *State*, 598.

44. It is not competent for the circuit court to discharge a person summoned under the special *venire*, in a capital case, without good and sufficient cause. The court says: "Upon the principles of reason and common sense, it is manifest that a circuit judge has no authority, without sufficient cause, to discharge a juror specially summoned for the trial of a capital felony." And further, "To dispense with a juror, summoned

upon the special *venire* in capital cases, without cause and against the consent of the accused, would be an unwarrantable exercise of authority by the judge presiding."—*Ib.*

45. To dispense with the attendance of persons summoned on the special *venire*, who failed to attend when called, is not error, provided the jury has been completed from those summoned and in attendance.—*Ib.*

46. To dispense with the attendance of such persons, is not a discharge of them, and they may be called again, if the jury should not be completed from those summoned and in attendance, and their attendance enforced, under the discretion of the court, by proper process.—*Ib.*

47. That persons not freeholders or householders, were summoned on the *venire*, is no ground for challenge to the array, or to quash; nor is it sufficient cause for reversal.—*Ib.*

48. A juror cannot be allowed to testify to facts that will avoid his verdict.—*Riggs* v. *State*, 674.

49. Any irregularity, or exposure to undue influence, of a jury, or misconduct of the officer in charge of them, will vitiate their verdict.—*Ib.*

50. The *venire* does not necessarily constitute a part of the record, unless placed there by being embodied in the bill of exceptions.—*Organ* v. *State*, 684.

51. It is not competent for the prisoner to question the sufficiency of the *venire* on error, when he has raised no objections to it in the court below, by motion or plea in abatement, but has pleaded in bar and been convicted.—*Ib.*

52. Any separation of a juror from his fellows, or from the superintendence of the bailiff, is *prima facie* evidence of irregularity; and his affidavit is inadmissible to justify his conduct during the separation.—*Ib.*

53. It is not necessary that the record should set out the oath prescribed to the jury.—*McCarty* v. *State*, 705.

54. If the record show that an "officer was sworn to take charge of the jury," it is sufficient.—*Ib.*

55. The name of the same juror appearing twice on the *venire*, without any collusion or improper design, and without any injury shown to have been done the prisoner by it, is no ground of error.—*Ib.*

56. The regular *venire* is a matter of record, accessible to the accused, and he is not entitled to a copy of it. But by the statute, he is entitled to a copy of the special *venire*.—*Ib.*

57. It is the duty of the court to see that a competent, fair and impartial jury is empanelled, and nothing can interfere with this duty but the right of the parties of peremptory challenge, or of challenge for cause good and sufficient in law, to be judged of by the court.

58. The record, in criminal cases, must show that the jury were sworn, but it need not set out the form of the oath prescribed to them by the court, McCarty v. State, 26 Miss., 299; and if the swearing of the jury is improper in any respect, it must be made a part of the record by bill of exceptions. But where the oath is set out and is incorrect the verdict will be set aside.—*Dyson* v. *State*, 710.

59. Until the contrary appear, it will be presumed that the jury were sworn according to law.—*Ib.*

60. The statement in the record that the jury "were sworn the truth to speak in the issue joined," is sufficient to show that they were sworn according to law.—*Ib.*

61. The annual list of jurors returned by the assessor of taxes does not annul or supersede the lists previously returned, but is intended to return the names of such persons as may have been previously omitted, or have since become liable to jury duty. Therefore, a person whose name did not appear on the list last returned, but did appear on the one next before the last, and was drawn from box number one, is a competent grand juror.—*Sumrall* v. *State*, 803.

62. Upon the challenge of a juror it is proper for the court to interrogate and try him as to whether he has formed or expressed an opinion in relation to the matter in

issue, and to reject him if found to have formed such opinion.—*Marsh* v. *State*, 839.

63. It is the duty of the court to see that an impartial jury is empanelled, and that it is composed of persons above all exception.—*Ib.*

64. After verdict it appeared that one of the jury had prejudged the case, although he had stated on his *voir dire* that he had formed or expressed no opinion. *Held* that the accused was entitled (under the rule laid over, in Nelson's case, 13 S. & M., 500, and Cotton's case, 31 Miss., 504) to a new trial. HANDY, J., *dissented*.—*Sam* v. *State*, 893.

65. The credibility of witnesses swearing to a juror's prejudgment of the issue was to be determined entirely by the court to whom the application for a new trial was addressed. The court was to consider the characters and positions of the juror and witnesses respectively, and the manner and circumstances of the juror's statements on his *voir dire*, and from these evidences to determine; and a determination thus made should stand. Per HANDY, J., *dissenting*.—*Ib.*

66. A man who from common rumor has formed an opinion as to the guilt or innocence of a party indicted for murder, which it would require testimony to remove, but who on his oath states that he feels as free to act in the matter as if he had never heard of the case, is incompetent. Nelson v. State, 13 S. & M., 500, cited and approved as authority.—*Cotton* v. *State*, 915.

67. Jurors in capital cases should always be entirely impartial between the state and the accused; and it is the duty of the court to see that the jury is composed of men above all exceptions in this respect.—*Williams* v. *State*, 933.

68. A large class of the community doubt the expediency of capital punishment, others have a strong repugnance to it. And some few individuals sincerely entertain conscientious scruples against it. It is the latter class who are disqualified from serving as jurors in capital cases, "provided only, however, that their scruples are such as would prevent them from finding a verdict according to the evidence." The disqualification of this class is too firmly settled to admit of controversy.

69. The jury are not to decide questions of law in criminal, any more than in civil cases. In this country, as well as in England, the courts are the judges of the law as much in criminal as in civil cases. The court here adopts the language of Judge Story, in the case of United States v. Battisto, 2 Sumner, 243. But the court is authorized to instruct the jury only in writing, at the request of the parties, and upon contested questions of law applicable to the issue.

70. Where the jury in a capital case, the trial of which lasted four days, lodged in a room at a public hotel, separate from the other guests, ate their meals at the table with the guests and boarders, but in a body at one end of the table, with an officer stationed between them and the other guests, were served at the table by the landlord and servants, were under the vigilant care of two sworn officers, could easily hear the conversation going on at the table, but none of the witnesses examined on the application for a new trial heard the case mentioned in the hearing of the jury, *Held*, that as the jury were always kept together, and under the supervision of a sworn officer, it is not to be presumed that any undue influence was exercised over them; and that the manner in which they were fed, though an irregularity, was insufficient to vitiate the verdict. FISHER, J., *dissented*.—*Browning* v. *State*, 991.

71. If the verdict be rendered under such circumstances that its purity might have been affected, it will be set aside. But if it could not have been affected, it will be sustained. Where, therefore, one of the jury, pending the trial, being at the window of the court-room, called to a person in the street, and asked him to request his (the juror's) wife to send him his supper, to which the person thus addressed replied that "he would;" and the supper was sent as requested, and the persons who brought it came into the room where the jury were confined, but were not permitted to deliver it to the juror, the officer in charge of the jury received it from their hands, and delivered it to the jury. The officer also kept the persons who brought the supper on the opposite side of the room, sixty feet from the jury, whilst the supper was being

eaten. The officer also testified that nothing passed between the juror and the person addressed by him in the street except what is above stated; and that, to his knowledge, the jury conversed with no one. It was held, that there was no improper tampering with or sinister influence brought to bear on the jury, and no cause for setting aside the verdict.—*Ned and Taylor* v. *State*, 1051.

72. A person who has not formed or expressed an opinion as to the guilt or innocence of the prisoner, who is indicted for murder, but has an impression on his mind, formed from rumor, in relation to the killing, which it might require evidence to remove, is competent as a juror. Per SMITH, C. J., and HARDY, J.—*Ogle* v. *State*, 1069.

73. But in such case, although the juror may be incompetent, a new trial will not be granted if the prisoner exercises his right of peremptory challenge, unless it be shown that he exhausted his peremptory challenges, and was thereby liable to have other jurors equally objectionable forced upon him. Per FISHER, J.—*Ib.*

74. The affirmative of an issue upon defendant's plea in abatement denying the competency of one of the grand jury is on the state: and upon the trial of such an issue one of the grand jury is incompetent to sit as a petit juror.—*Ib.*

75. It is not every improper or illegal act of the officer in charge of a jury in their retirement, or of the jurors themselves, that will justify setting aside their verdict. To justify such a result, the act or misconduct must be such as is calculated to exert an improper influence on the verdict.—*Pope and Jacobs* v. *State*, 1146.

76. Where improper influence may have been exerted upon the jury, the presumption of law is against the purity of their verdict; but if it be shown that such influence failed of effect, the verdict will not be set aside.—*Ib.*

77. A juror's testimony to impeach or sustain his verdict, is not admissible on hearing a motion for a new trial.—*Ib.*

78. The power to discharge the jury is a matter within the sound discretion of the court, to be exercised whenever the ends of public justice require it; and such discharge will not bar a subsequent trial and conviction. Hence, where, at a former term, the jury disagreed, and were discharged by the court, it is no ground of error.—*Price* v. *State*, 1168.

79. The constitutional rule, that no person shall be twice put in jeopardy of life or limb for the same offense, means that he shall not be again tried for the same offense, after he has been once convicted or acquitted.—*Ib.*

80. Where the reasons and circumstances upon which the court discharged the jury do not appear, it will be that it was done legally.—*Ib.*

81. An opinion formed from rumor, so fixed as to require testimony to remove it, constitutes such a bias as to render a juror not impartial, and therefore incompetent.—*Alfred* v. *State*, 1235.

82. The circuit court has the right to set aside a juror, without challenge from either party.—*McGuire* v. *State*, 1291.

83. After a juror has been sworn and has taken his seat, if it be discovered that he is incompetent to serve, the court, in the exercise of a sound discretion, may set him aside at any time before evidence is given.—*Ib.*

84. That there is a reasonable ground to suspect that a juror will act under some undue influence or prejudice, is sufficient to authorize the court, in the exercise of a sound discretion, to set him aside.—*Ib.*

85. The fact that a juror stood indicted and untried for the same kind of offense as that for which he was called upon to try another person, is sufficient ground for setting him aside.—*Ib.*

86. Where no objection appears to have been made to a juror sworn in the place of one set aside, it will be presumed that the case was tried by an impartial jury.—*Ib.*

87. A person over the age of sixty years is incompetent as a juror, and may be challenged for cause by either party; but if he sit without objection, the verdict for that cause will not be vitiated.—*Williams* v. *State*, 1328.

88. By the express terms of Rev. Code, 497, art. 126, a person who is an alien is disqualified to act as a juror in any case; yet if his disability was not made known to the

court, and the defendant accepted him at the time, knowing the existence of such disability, it will be presumed that all objections were waived; and the juror having sat in the case will not vitiate the verdict.—*George* v. *State*, 1404.

89. Upon the trial of an issue of a plea of *autrefois acquit* to an indictment for murder by a jury, it is not necessary to ask them if "they have formed or expressed an opinion in regard to guilt or innocence of the prisoner." It is sufficient if they have not formed or expressed an opinion in regard to the question in issue.—*Josephine* v. *State*, 1439.

90. The circuit court has no power to discharge a jury when *they say* that they cannot agree. But the court has the power to discharge them when there is a necessity for it, as where the term of the court was within a few minutes of its expiration when the jury returned into court and made known their inability to agree, and were discharged.—*Ib.*

91. It is not necessary that there should be an *actual, positive, pressing necessity*, in order to give the court power to discharge the jury; it is sufficient if, in the opinion of the court, there is a *legal necessity* for so doing.—*Ib.*

92. Objections to the jury must be made before the trial of the case; it is too late to object after verdict.—*Frank* v. *State*, 1474.

93. Motions in arrest must be made on the ground of some defect appearing on the face of the record. Hence the fact that one of the jury was not a householder or a freeholder, or was otherwise incompetent, is no ground for a motion in arrest of judgment.—*Ib.*

94. It is not every improper or illegal act of the officer in charge of the jury, or of the jury themselves, that will constitute just cause for setting aside the verdict. It must be shown that such improper conduct of the officer or jury exposed them to the exercise of improper influences on them. If this is not shown the verdict will not be disturbed.—*Caleb* v. *State*, 1490.

95. The separation and dispersion of the jury, in a capital case, has always the effect to vitiate a verdict of guilty.—*Woods* v. *State*, 1624.

96. The separation and dispersion of a jury, in a capital case, though by the consent, or even at the request of the prisoner on trial, vitiates a conviction.—*Ib.*

97. If it appear that the jury trying a capital case in which a conviction was had, were so exposed to intercourse with others as that they *might* have been subjected to corrupting or improper influences, that fact alone will nullify their verdict. The only safety for the purity and integrity of jury trials is in the absolute exclusion of all opportunity, during the trial, for the exertion of improper influences on the men composing the jury.—*Ib.*

98. It is no ground to quash a special venire in a criminal case, that one of the jurors named in it, was not a citizen of the United States; that would have been good cause of personal challenge or of challenge to the poll, but it is not a defect in the writ.—*Durrah* v. *State*, 1668.

99. The causes for which a *venire facias* may be quashed, must be either some fraudulent misconduct of the officer, or some manifest error in selecting, drawing or summoning, in violation of law.—*Ib.*

100. That a copy of the venire had not been served on the prisoner or his counsel a sufficient time before the trial, would be no ground to quash the writ, although it might be ground for postponing the trial until he should have such time, and if he does not object for such reason, but goes into trial, he will be taken to have waived the objection.—*Ib.*

101. Art. 1, sec. 13, of the Constitution, and the act of 20th July, 1870, p. 88, abolish property qualification for jury service, and impose that duty on all citizens alike, who are not specially exempt: but the previous laws regulating the manner of selecting, summoning, and empanelling juries, and preferring objections thereto, still apply, unless abrogated by the Constitution and laid.—*Head* v. *State*, 1700.

102. By Art. 131, Rev. Code, 499, no objection by plea or otherwise shall be raised to empanelling the grand jury; but the empanelment shall be conclusive evidence of its

competency and qualification; and after it is organized and charged it is too late to prefer objections. Although any person whose conduct may be the subject of inquiry or investigation, may challenge, or except to, the array for fraud.—*Ib.*

103. By Art. 250, Rev. Code, 613, the courts are instructed to regard all the laws and statutes relating to the mode of selecting, summoning, and empanelling all juries as *directory* merely. After they are empanelled and sworn, though it be in an irregular or informal mode, they must be deemed legal and competent in both civil and criminal proceedings.—*Ib.*

104. It is the duty of the court to superintend the selection of the jury, in order that a fair and unbiased jury may be had, and herein the court has a very large discretion; and the action of the circuit court in this behalf will not be subject to revision here, unless a violation of law, or a gross and injurious exercise of discretion, is shown.—*Ib.*

JUS PUBLICUM.

1. The statute of 1832 reserves to the legislature the right to dispose of the entire two sections of land designated by the commissioners to locate the seat of government, except the streets and lots which may be sold from time to time. This vests the title to the streets in the corporation of the city, and deprives the legislature of the power to dispose of them, except so far as the *jus publicum*, or right of eminent domain may authorize it. This right of domain always exists, unless the state has absolutely parted with it by grant.—*Donnaker* v. *State*, 374.

2. There is a necessary exception in the title of all property, that if it be necessary for public use, it may be taken for such purpose, provided that just compensation shall be made to the owner.—*Ib.*

3. The property of a corporation is not less liable to the exercise of the *jus publicum* than the property of a private individual. A corporation is an ideal individual, and is to be treated as other individuals.—*Ib.*

LARCENY.

See *Evidence, Indictment.*

1. The felonious taking and carrying away of the mere personal goods and chattels of another with the criminal intent to apply them to the party's own use, constitutes the crime of larceny, and is its technical definition; and, although it is usual to use the terms "did feloniously steal, take, and carry away," etc., the omission of the word "steal" will not vitiate the indictment.—*Damewood* v. *State*, 87.

2. At common law, bank notes, bank bills, and bills of credit were not subjects of larceny, but they are made such by our statute, which provides that, "Robbery, or simple larceny, may be committed, of obligations, bonds, bills obligatory, or bills of exchange, *promissory notes for the payment of money*, or notes for the payment of specific property, etc." In an indictment for larceny of a bank note, it should be described as a promissory note for the payment of money, purporting to be a bank note.—*Ib.*

3. Where a prisoner has been found guilty on a charge of larceny, and the court below pronounced an illegal sentence, the appellate court will reverse the sentence, and pronounce judgment in conformity to the statute.—*Oliver* v. *State*, 157.

4. At common law, bank notes are property, and are the subject of larceny or robbery. Were it otherwise, they are made so by the 20th section of the act of 1822, which provides "that robbery or simple larceny of obligations, or bonds, bills obligatory, or bills of exchange, promissory notes for the payment of money, etc., shall be punished as simple larceny or robbery of goods and chattels, etc. Bank bills or bank notes are promissory notes of the corporation which issues them.—*Gresson* v. *State*, 170.

5. If one lose his goods and another find them and convert them to his own use, not knowing the owner, it is not larceny; but if the finder knew the owner, or had the means of knowing him, it would be larceny.—*Randall* v. *State*, 254.

6. Under the laws of this state, a negro *prima facie* is presumed to be a slave; and if he be found in the possession of one other than his owner, under suspicious circumstances, it will be sufficient to put such person upon the explanation of the circumstance of his possession. And it is the duty of every citizen who finds a slave at large, without a permit from his owner, to deliver him to the nearest justice of the peace for commitment.—*Ib.*

7. R. was indicted for stealing the slave of Bridges. It was proved that the slave ran away, and was absent five months, when he was found in the woods; that during this absence, Randall was seen traveling along the road with a negro very much resembling the slave of Bridges, and whom the witness believed to be the slave of Bridges, though he was not sure. Witness did not know the slave, and had only seen him once. Randall, when seen with the slave, was going in the direction of Bridges's residence. *Held*, that the evidence was not sufficient to warrant a verdict of guilty, nor to put the defendant on proof in explanation, and that a new trial should have been granted.—*Randall* v. *State*, 254.

8. Grand larceny in this state consists in the stealing, taking, and carrying away of any property of greater value than twenty dollars, and where a prisoner has been indicted in two counts, each charging this offense, the verdict of the jury finding him guilty, generally, without specifying the value of the stolen property, will be sufficient to warrant a sentence and judgment for the offense of grand larceny; although the jury *might*, under the indictment, have found a verdict for *petit* larceny.—*Wilburn* v. *State*, 333.

9. To constitute larceny, it must be proved that the goods were wrongfully or fraudulently taken and carried away, with the intent of the taker to convert them to his own use. If there be no such intention, it amounts to a trespass only. If the taking be open and in the presence of the owner or other persons, it is only a trespass. But if the goods be taken either by violence, or by putting the owner in fear, it is sufficient to constitute robbery.—*McDaniel* v. *State*, 336.

10. Upon a conviction of larceny of property of value under twenty dollars, the court has unlimited jurisdiction as to the length of imprisonment, provided it be not less than two years in the penitentiary.—*Swinney* v. *State*, 351.

11. A slave who has absconded from the possession of his owner is nevertheless in his constructive possession; and the master might maintain trespass for any injury done to the slave during the period of his absconding.—*Coon* v. *State*, 455.

12. If a person lose his goods and another finds them, and converts them to his own use, not knowing the owner, it is no larceny; but if he knew the owner, or had the means of knowing him, it would be larceny.—*Ib.*

13. A negro, by the laws of this state, is *prima facie* a slave. If a person, therefore, who is not the owner, take a runaway negro into his possession, with the intent of feloniously converting him to his own use, knowing or having the means of knowing the owner, it is larceny.—*Ib.*

14. No definite length of time after loss of goods and before possession shown in the accused, seems to be settled, as raising a presumption of guilt. Where the goods are bulky, or inconvenient of transmission, a greater lapse of time is allowed to raise the presumption of guilt, than if they were light and easily conveyed.—*Jones* v. *State*, 702.

15. In prosecution for larceny of a saddle or the like, after the lapse of nearly a year, the mere fact that the chattels were found in the possession of the accused, creates no presumption of guilt, and such possession without evidence *aliunde* to establish the charge is not sufficient to put the accused on his defense.—*Ib.*

16. The possession of property recently stolen will create a presumption that the possessor is a thief; but this is a mere presumption, and the true state of the case may be entirely different, and the party may be enabled to show his innocence by positive testimony.—*Jones* v. *State*, 858.

17. The possession of stolen goods must be accounted for; but as this cannot always be done by legal evidence, owing to the nature of the goods and the circumstances of the

case, it is a matter of no little weight that the conduct of the accused is consistent with the account he gives of his acquisition of their possession.—*Ib.*

18. The fact that he makes no attempt at concealment, but openly exposes the goods where they are subject to be recognized by the owner or others interested, are circumstances that strongly tend to destroy the presumption arising from such recent possession.—*Ib.*

19. When the accused gives a reasonable account of his possession of stolen property, it lies on the prosecutor to show that it is false; but if it is unreasonable or improbable on its face, the accused must prove its truth.—*Ib.*

20. To constitute the offense of larceny, it is not necessary that the taking should have been *causa lucri*—it is sufficient that the taking were fraudulent and with intent to deprive the owner of his property. Review of common law authorities on this point.—*Hamilton* v. *State*, 1089.

21. The possession of recently stolen goods, if unexplained, is presumptive evidence of guilt; and what facts or circumstances are sufficient to explain such possession is, for the most part, to be determined by the jury.—*Belote* v. *State*, 1120.

22. Where a bill of sale has been procured by false and fraudulent misrepresentation, without any consideration, from a weak-minded old woman, who was under the care and protection of the defendant, it is competent evidence to establish the defendant's original intention.—*Watson* v. *State*, 1184.

23. A person leaving this state with the felonious intention of stealing slaves in another state, and bringing them into this state, and here converting them to his own use, and carries that design into execution, is guilty of larceny, and may be indicted in this state for such.—*Ib.*

24. The legal possession of goods stolen continues in the true owner; and every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation, which may be the subject of indictment in every state to which the goods are removed.—*Ib.*

25. To constitute larceny, it is not necessary that the accused should have actually laid his hands on the article stolen; it is sufficient if he, with an intent to commit larceny, is near by, aiding and abetting other parties.—*Hogsett* v. *State*, 1505.

26. When counts for grand larceny, and for receiving stolen goods, are joined in the same indictment, and the jury return a verdict of guilty generally, and assess the value of the property at such a sum as reduces the offense under the first counts to petit larceny, the court cannot properly render a judgment on such verdict.—*Jenkins* v. *State*, 1526.

27. Under an indictment for grand larceny, if the jury find the defendant guilty, they must also find the value of the property feloniously taken.—*Shines* v. *State*, 1559.

28. On the trial of an indictment for grand larceny, where the jury return a verdict of guilty as charged in the bill of indictment, but fail to find the value of the property feloniously taken, the court has no power to fix the value of the property and the grade of the offense.—*Ib.*

29. S. was indicted for the larceny of two yearlings, of the value of thirty dollars. The jury returned as their indictment, "Guilty as charged in the bill of indictment." *Held:* That the failure of the jury to find the value of the property stolen was error, which the court had no power to correct.—*Ib.*

30. In rendering a verdict of guilty in any case of simple larceny, the jury should always find the value of the property stolen, or the court cannot legally pronounce judgment.—*Unger* v. *State*, 1584.

31. In prosecutions for larceny, where the goods have been proven to have been stolen and in the possession of the accused soon afterwards, the fact of possession raises a reasonable presumption of his guilt.—*Ib.*

32. Where the owner of the goods cannot be ascertained, the indictment laying them to be the property of some person unknown will be valid. But if the owner is known, such an allegation will be improper; and, on the discovery of his name on the trial, the prisoner will be acquitted. Wherever the name of the party is known, it is also

lutely necessary to insert it in the indictment, and the entire Christian name as well as the surname of the party must also be inserted.—*Ib.*

33. To sustain an indictment for larceny, it must be proved that the goods alleged to be stolen are the absolute or special property of the person named as owner in the indictment, and that the offense has been committed.—*Ib.*

LEADING QUESTIONS.

See *Evidence, Witness.*

1. Questions are leading, which suggest to the witness the answer desired; or which embody a material fact, and may be answered by a mere negative or affirmative; or which involve an answer bearing immediately upon the merits of the cause, and indicating to the witness a representation which will best accord with the interests of the party propounding them.—*Thumey* v. *State*, 305.
2. On the examination in chief, it is irregular and improper to propound a question which assumes a fact to be proved which is not proved: whether such a question is or is not a leading question, *quære.*—*Ib.*
3. It is a well-established general rule, that leading questions should not be propounded to a witness on the examination in chief; but there are exceptions to this general rule; as where the witness is manifestly reluctant and hostile to the interest of the party calling him; or where he has exhausted his memory without having stated the particular required, as a proper name or other fact, which cannot be arrived at by a general inquiry; or where the witness is a child of tender years, whose attention cannot be otherwise called to the subject-matter.—*Ib.*
4. The circuit court before which the examination is had, is allowed to exercise a certain discretion in permitting leading questions to be propounded to a witness on the examination in chief; that discretion, however, is not an absolute or arbitrary one, but is subject to revision in the appellate court; and if it appear that leading questions were propounded under circumstances that did not justify them, and that the party against whom they operated excepted to them at the time, this court will reverse the judgment, and grant the injured party a new trial. Mr. Justice CLAYTON dissenting as to the power of the appellate court to revise the discretion exercised by the court below in permitting the leading questions.—*Ib.*
5. This discretion of the court to permit leading questions on the examination in chief, is allowed to be exercised alone in the cases forming exceptions to the general rule, and where these do not exist, the discretion is not allowed; as where the witness is a willing witness, of competent age, or favorable to the party calling him: in these cases, to allow leading questions will be a fatal error.—*Ib.*
6. On the trial of the prisoner for a rape, the victim of the outrage being a witness for the state, testified that the crime had been committed seven months before indictment found, which, as far as appeared by the record, was the first disclosure by the witness of the commission of the crime; it also appeared that the prisoner had been the guardian of the witness from early orphanage, and was her step-father; and that she was, at the time of the alleged offense, sixteen years of age;—she was then asked, "Did the prisoner then, or at any subseqnent time, say anything to you in relation to this matter to dissuade you from disclosing it? State when, where, and what he said." This was held to be a leading and illegal question. Mr. Justice CLAYTON, *dissenting*, held the question to be legal and proper.—*Ib.*
7. Under the same circumstances, the following question, propounded to the same witness, was held to be leading and improper, viz.: "Did the prisoner, at any time subsequent to the transaction, say anything to you about what punishment the laws of Mississippi would inflict on you or him, or both? State it all." Mr. Justice CLAYTON *dissenting.*—*Ib.*
8. Under the same circumstances, the question to the same witness, "If the prisoner, in any of his antecedent conversations, offered property or any other advancement to you,

in order to attach you to him, say so;" was held to be illegal and inadmissible. Mr. Justice CLAYTON *dissenting*.—*Ib.*

9. Upon cross-examination of a witness, greater latitude is allowed than on an examination in chief, and leading questions are admissible.—*Boles* v. *State*, 593.

10. A leading question is one which directly suggests the answer which is desired, or which embodies a material fact and admits of an answer by a simple negative or affirmative, though neither be directly suggested. But if the object of the question is to direct the mind of the witness to what is material, and if it relate to matter merely introductory, it should not be objected to, although in form it be leading.—*Stringfellow* v. *State*, 691.

LIMITATIONS.

1. The statute of limitations declares, that no person shall be prosecuted, etc., for any offense, wilful murder, arson, forgery, counterfeiting, and larceny excepted, unless the indictment, presentment, or information for the same be found within one year next after the offense shall be committed.—*Heward* v. *State*, 465.

2. An instruction that charges the jury that if the offense did not amount to murder, but only to manslaughter, and was committed more than a year before the finding of the indictment, they must acquit the defendant, is correct, and should be given.—*Ib.*

3. The statute of limitations does not run in favor of fugitives from justice.—*Clarke* v. *State*, 530.

4. In a proceeding by the state upon the official bond of a defaulting public officer, a general statute of limitations or the neglect or delay of the public officers in commencing proceedings, is no defense.—*Joiner* v. *State*, 573.

LIBEL.

1. The office of an indictment is to connect the libel with the extrinsic facts, to show the meaning and bearing of words and phrases used in it, and is necessary, when the words published would not be libellous, unconnected with such facts.—*State* v. *Chace*, 80.

2. The court will regard the use of fictitious names and disguises, in a libel, in the sense that they are commonly understood by the public.—*Ib.*

LOTTERIES.

1. The clause of the constitution forbidding states to pass laws impairing the obligation of contracts should be read and considered in connection with the ancient principles of the common law.—*Miss. Society of A. & S.* v. *Musgrove, Aud'r, et al.*, 1723.

2. Not all legislation which may, incidentally, have the effect to impair contracts, is obnoxious to the constitutional prohibition. Illustrations of the exceptions, which may be upheld, with the limitations, which must be enforced.—*Ib.*

3. The constitutional prohibition, being addressed to the "state," applies as much to the framers of a state constitution as to a legislature.—*Ib.*

4. The legislature may take away, by statute, what has been given by statute, unless rights under it have vested. This rule illustrated.—*Ib.*

5. A lottery grant is repealable except when contracts have been made or rights vested, as between the grantees and others, which a repeal would infringe.

6. There seems to be no disagreement in the authorities that, if no consideration has been paid for a license, it is open to repeal.—*Ib.*

7. Whether the prohibitory clause in favor of contracts can ever be allowed to affect the power of the state to enact police regulations for the protection of health and morals; and whether, on account of their pernicious and demoralizing influence in the community, lottery companies who have paid a bonus may not still be included in the repealing power, *quære*.—*Ib.*

8. If plaintiff had even made formal tender of full performance of all the conditions pre-

cedent to the enjoyment of their franchise before the repealing laws took effect, these repealing laws would have swept away their franchise, because no contract had been perfected, and no right vested before the business became unlawful, *quære.—Ib.*

9. It seems *passim*, that lottery enterprises should be regarded as of evil and demoralizing character and tendencies.—*Ib.*

MALICE.

See *Evidence, Homicide, Presumptions.*

1. Presumption of a malicious intent, may arise from the character of the weapon used in the perpetration of the deed.—*Woodsides* v. *State*, 95.
2. There is a plain distinction between express and implied malice; the one is characterized by a sedate, deliberate intention and formed design, evidenced by external circumstances; the other is the offspring of sudden impulse.—*Anthony* v. *State*, 467.
3. Express malice is evidenced by a previous threat or former grudge; and it is for the jury to determine whether the threat or grudge is established. If the threat be proved satisfactorily to have been made, and afterwards carried into execution, it will be presumed to have been done with a malicious intent, and it is incumbent on the accused to show circumstances giving it a different character.—*Riggs* v. *State*, 846.
4. Where express malice is shown, and the person against whom the threat or other evidence of malice was made or existed, be afterwards killed with a deadly weapon, by the person harboring the malicious purpose, no mere provocation at the time of committing the act will relieve it of the character of malicious killing, but it is presumed to be in consequence of the previous threat or grudge.
5. Express malice is, when one, with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.—*Wray ex parte*, 875.
6. The declarations of a prisoner, made when he obtained weapons for an anticipated difficulty, that he did not intend to use them unless other parties interfered, and the fact that he did not use them until closely pressed by his antagonist and violently beaten, are sufficient to disprove express malice. HANDY, J., *dissented.—Ib.*

MERGER.

1. The doctrine of merger does not apply to the offense of conspiracy of slaves to murder a white person. Nor was the statute (Hutch. Digest. 983, § 31) which declares "that no person shall be convicted of an assault with intent to commit a crime, or any other attempt to commit an offense, when it shall appear that the crime intended, or the offense attempted, was perpetrated at the time of such assault, or in pursuance of such attempt," designed to apply to this class of cases.—*Laura* v. *State*, 700.

MURDER.

See *Evidence, Homicide, Indictment.*

NEW TRIAL.

See *Evidence, Jury, Instructions.*

1. The voluntary withdrawal, during the trial, of a witness subpœnaed, but not examined on behalf of the state, is not sufficient ground to grant a new trial, especially where his testimony is not shown to be material for the defendant.—*State* v. *Bienvenhassett*, 1.
2. Where the jury assess a fine, the court will not grant a new trial, unless the amount of the fine is so excessive as to evince partiality or corruption in the jury.—*Ib.*
3. The mere affidavit of a third person, that the prosecutor had declared that there was in existence a bill of sale of the property charged to be the subject of the larceny, which bill of sale went to establish title in the prisoner, is not a sufficient ground for

a new trial, unless the affidavit be supported by the oath of the prisoner, alleging sufficient reason why such bill of sale was not produced on the trial, and an expectation that it could be procured on a subsequent trial. The affidavit of a juror will not be received to impeach the verdict of the jury.—*Friar* v. *State*, 114.

4. The bill of exceptions should set forth the precise grounds of exceptions, otherwise the court cannot take cognizance of the subject-matter.—*Ib.*

5. Where a person who was not a sworn officer was permitted to go into the jury-room after the jury had retired to make up their verdict, in a capital case, and to have charge of them in the absence of the bailiff, it was held a sufficient ground for a new trial.—*Hare* v. *State*, 133.

6. The well established rule is, that wherever the circumstances of irregularity attending the deliberations of a jury *might* have affected the correctness or purity of the verdict, the verdict cannot be sustained; on the contrary, where those circumstances could *not* have influenced the jury in its determination, the verdict shall not stand. TROTTER, J., *dissented.*—*Ib.*

7. In criminal prosecutions, after the verdict of a jury, and a judgment of acquittal, neither a new trial nor a writ of error can be granted to the state.—*Anderson* v. *State*, 247.

8. When an application for a new trial is made, the judge is supposed to know nothing of the testimony which will be adduced; he can, therefore, only determine the materiality of the facts stated in the affidavit, by the consideration of what might be urged in the defense, if they should be established. His means of judging are less satisfactory at that stage than at the close of the trial; therefore, if at the conclusion the court is convinced that the continuance should have been granted, it should allow a new trial; and if it refuse a new trial, the party asking it should give all the testimony in his bill of exceptions, that the appellate court may see the bearing of the whole evidence, and thus be able to judge of the force of the application for a continuance.—*McDaniel* v. *State*, 336.

9. Where a party is found guilty on three counts of an indictment, and acquitted upon one, and a new trial granted, the new trial should be had upon the three counts on which he was found guilty.—*Morris* v. *State*, 387.

10. When no exceptions are taken in the court below to the grand jury, the prisoner cannot, after plea of not guilty, and conviction, for any defects in that body, be entitled to a new trial in the high court of errors and appeals.—*Brantley* v. *State*, 484.

11. The refusal of the court to grant a new trial, asked for on the grounds of irregularity in the jury, and the want of evidence to sustain the verdict, was assigned as error; and on the hearing of the cause on writ of error, SMITH, C. J., and HANDY, J., were of opinion that the irregularity in the jury was insufficient to vitiate the verdict, from which decision FISHER, J., dissented, while HANDY, J., and FISHER, J. (SMITH, C. J., dissenting), decided that the evidence supported the verdict. On motion to set aside the judgment of affirmance in the case, it was held, That as the same majority of the court did not agree on both grounds for refusing the new trial, the judgment of affirmance should be set aside, and the judgment of the court below reversed and the cause remanded. HANDY, J., *dissented.*—*Browning* v. *State*, 991.

12. A new trial will not be granted to allow a party to introduce new evidence, which is merely cumulative, and which it does not appear was unknown to him before, and could not have been procured by him at the trial.—*Newcomb* v. *State*, 1303.

13. The courts may disregard the statements made in *ex parte* affidavits read in support of a motion for a new trial, where such statements are highly improbable, and inconsistent with the state of facts appearing on the trial.—*Ib.*

14. A new trial will not be granted for newly-discovered evidence when it appears from the affidavits read in support of it that the party asking the new trial must necessarily have been aware of the evidence when the trial was had.—*Frank* v. *State*, 1474.

NOLLE PROSEQUI.

See *District Attorney, Indictment, Practice.*

NON-IDENTITY.

See *Pleading, Practice.*

1. The plea of *non-identity* is to be pleaded *ore tenus*, and is never allowed, except in cases where the prisoner has escaped after verdict and before judgment, or after judgment and before execution. On review, to render the plea valid, the record must show an escape.—*Thomas* v. *State*, 160.

OFFICERS.

See *Judge, Jury, Practice.*

1. The commissioners of public roads are liable to a criminal prosecution for any neglect of duty.—*State* v. *Commissioners, &c.*, 29.
2. The records of the old county court are public documents, and when that court was abolished, the clerk of the probate court was appointed as the officer to take charge of those records; and the register of the orphan's court was directed to deliver to him all books, records, &c., pertaining to the office of register. He is therefore the proper certifying officer of all such records.—*Byrd* v. *The State*, 78.
3. The acts of public officers, especially judicial tribunals acting within their jurisdiction, are valid, and done rightly until the contrary is proven.—*Dyson* v. *State*, 710.
4. Art. 120, p. 123, of Rev. Code, which provides that "if any sheriff or his deputy, coroner, or other officer, shall make a false return on any process, such sheriff, deputy," &c., "shall, for every such offense, be liable to pay the sum of five hundred dollars," &c., to be recovered on motion; and notice given to "such sheriff, deputy," &c., creates a penal offense against the officer committing the act, and renders him individually liable for it; and the sheriff and his sureties are not liable on motion, under that article, for a false return made by his deputy, but the deputy himself is responsible.—*State* v. *Nichols*, 1358.
5. The state of Mississippi is as properly a plaintiff in a prosecution or suit instituted in her name as a private individual, and hence is entitled to all the remedies provided by law for plaintiffs against sheriffs or other officers for misconduct in the execution and return of process.—*Ib.*

PARDON.

1. Where a person has been indicted for an offense, and before conviction is pardoned, he is not liable for the costs of court and witnesses' fees.—*White* v. *State*, 1578.

PERJURY.

See *Evidence, Indictment.*

1. In an indictment for perjury it is not necessary to allege that the false affidavit charged an offense upon any particular individual, in order to constitute the crime of wilful perjury.—*Carpenter* v. *State*, 126.
2. On trial of the indictment for giving false testimony as a witness, an affidavit of the accused is not admissible as evidence. In such case, the accused should have been indicted for the perjury of making a false affidavit.—*Copeland* v. *State*, 527.
3. To support an indictment for perjury, it must be shown that the false swearing was not only intentional, but wilful and corrupt, and was in relation to a material matter in issue before the court where the false swearing was done.—*Cothran* v. *State*, 1382.
4. If the court instruct the jury that they must convict if the false swearing was done wilfully, without stating that it must have been done corruptly, it will be error.
5. Whether the false swearing alleged was material in a former suit, is a matter of law to be judged of by the court, and not a matter of fact to be submitted to the jury.—*Ib.*

PLEADING.

See *Practice.*

1. The plea of *non-identity* is to be pleaded *ore tenus*, and is never allowed except in cases where he prisoner has escaped after verdict and before judgment, or after judgment and before execution. On review, to render the plea valid, the record must show an escape.—*Thomas* v. *State*, 160.
2. In criminal cases, the prisoner must plead in person; any plea by attorney is a nullity.—*McQuillen* v. *State*, 358.
3. A prisoner has the right to question, by plea in abatement, the competency of the grand jury by whom he was indicted; he cannot be called to answer a charge unless it has been preferred according to law.—*Ib.*
4. Pleas in abatement must be made at the proper time; by denying the charge the accused waives matter in abatement.—*Ib.*

PRACTICE.

See *Indictment, Evidence, Instructions, Pleading, Witness.*

1. The rule is well settled in this state, that a party may pursue such order as he thinks proper, in the introduction of his testimony, unless where a foundation is necessary to be laid for the introduction of secondary evidence.—*Byrd* v. *State*, 73.
2. The sheriff, as one of the officers of the court, is competent to serve the prisoner with a copy of the indictment and the *venire*.—*Frier* v. *State*, 114.
3. The statute requires that the prisoner shall be furnished with a copy of the indictment and a list of the *venire*, two entire days before the trial; and he cannot be compelled to go to trial without it. But if he goes to trial without this, making no objection, he will be deemed to have waived this right, and will not be allowed to object here.—*Loper* v. *State*, 120.
4. Where the prisoner had been tried and convicted at the June term of the criminal court, and for some cause sentence of the law was delayed till the next term, and in the meantime one of the counsel who had assisted the state on the trial had been elected judge of said court, there is no legal objection to his sitting as judge in the case, and pronouncing the sentence of the law upon the prisoners, whatever may be the propriety or impropriety of such action. The objection is one which cannot be raised and adjudicated in this court.—*Thomas* v. *State*, 160.
5. When the parties have agreed to consider a plea as filed, and issue as joined, it is error to render judgment by default.—*McEuin* v. *State*, 232.
6. In criminal cases it should not be allowed or encouraged, except in very extreme cases, to admit what the prisoner, in his application for a continuance, stated he expected to be proved by the absent witness; but when such admission has been once made, it constitutes an admission, not merely that the absent witness would have sworn to certain alleged facts, but, also, that the facts alleged are absolutely true.—*Domingos* v. *State*, 302.
7. Where an accusation includes an offense of inferior degree, the jury may acquit of the higher crime, and convict the defendant of a degree less atrocious.—*Swinney* v. *State*, 351.
8. In criminal cases the prisoner must plead in person; any plea by attorney is a nullity.—*McQuillen* v. *State*, 358.
9. It is incompetent for the clerk at a subsequent term to make any entry of what transpired at a previous term.—*Ib.*
10. When the judge of the circuit court refuses to sign a bill of exceptions, it may be signed by two of the attorneys of said court, and be in compliance with the statute.—*Rawls* v. *State*, 368.
11. In cases of homicide it must appear affirmatively that the accused was present at the trial, or it will be error. The presence of the prisoner cannot be inferred.—*Scoggs* v. *State*, 384.

12. The duty of the district attorney is to prosecute offenders; but in his absence the state has a right to employ other counsel, and the duty performed by them will be valid.—*Keithler* v. *State*, 403.

13. The legislature has power by the constitution to provide for the filling of all vacancies; and if the absence of the district attorney cause even a temporary vacancy it may be provided for by legislation.—*Ib.*

14. It is the duty, but not an essential one, that the district attorney should sign the bill of indictment; but the absence of his signature does not affect the validity of the indictment.—*Ib.*

15. The judge of the circuit court has a right to modify instructions asked by counsel, so as to make them conform to his own view of the law. And if a party object to such modifications he must embody them in his bill of exceptions.—*Ib.*

16. The charge or modification must be in writing, unless by consent of the parties to the contrary; and, in the absence of any objections on the record, such assent will be presumed.—*Ib.*

17. Where a motion in arrest of judgment is overruled in the court below, and sustained in the appellate court, on the grounds of a defective indictment, the prisoner must be remanded for a new indictment.—*Jones* v. *State*, 418.

18. In criminal cases no appeal lies from the circuit court to the high court of errors and appeals. Such case can only be brought up by writ of error.—*Loftin* v. *State*, 420.

19. A writ of error cannot be entertained in the appellate court unless there has been a judgment in the court below.—*Ib.*

20. All recognizances entered into by persons charged with a criminal offense, must be made returnable to the term of the circuit court next to occur by law after the time that the said recognizances are taken.—*Butler* v. *State*, 428.

21. It is well settled that it is competent for the circuit judge, in criminal prosecutions, as well as in civil cases, to modify the instructions requested on either side, so as to make them conform to his own views of the law.—*Cicely* v. *State*, 435.

22. Instructions granted for the state, not excepted to at the time they were given, nor made grounds for a new trial, will not be considered on error to the high court of errors and appeals.—*Bond* v. *State*, 469.

23. Under the statute, Hutch. Code, 983, § 22, upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the offense charged, but guilty of an inferior degree of such offense, and such a conviction will be a bar to another indictment for the same offense.—*Brantley* v. *State*, 484.

24. A party must plead to the indictment before he can be put upon his trial, and such plea must be shown by the record.—*Sartorious* v. *State*, 624.

25. The right of all courts of justice to punish, by fine and imprisonment, for contempt of their authority, is an inherent right pertaining to them, and which they would have power to exercise independent of any statute.—*Adams, ex parte*, 665.

26. The high court of errors and appeals will give no countenance to objections to the grand jury, when no complaint was made in the court below, and the accused submitted himself to trial, and was convicted.—*McCarty* v. *State*, 705.

27. If evidence is proposed, which, of itself, appears irrelevant to the issue on trial, and is objected to, the party offering it is bound to show its relevancy either by explanation to the court as to its bearing on the case, or by introducing other evidence connecting it with the *res gestæ*, and opening the door to its admission.—*Dyson* v. *State*, 710.

28. The high court of errors and appeals will not take cognizance of points not presented in the court below; and the rule applies with greater force where the point is one of fact, and was raised and abandoned.—*Ib.*

29. To prepare poison with intent to kill a person, and the crime of administering such poison for a like purpose, are two different offenses. Yet there can be no objection to an indictment on the ground that these two offenses are charged in it against the same person.—*Sarah* v. *State*, 750.

30. In England it is held to by irregular where two distinct felonies are charged in the same indictment, but in the United States the courts have held that distinct felonies of the same character, though differing in the degree of punishment, may be charged in the same indictment against the same person.—*Ib.*

31. The words "persons in this state" in the statute against poisoning, were intended to designate the jurisdiction of the offense, and not as descriptive of the persons against whom the crime might be committed. And an indictment not alleging that the person attempted to be poisoned was "a person of this state," is not deficient on that ground.—*Ib.*

32. In order to show that the alleged act of administering the poison came within the meaning of the statute, it is essential to allege the manner in which the poison was administered.—*Ib.*

33. The word "administer" used in the statute, does not mean that the article given in order to effect the felonious intent, must be given under the pretense that it is a medicine. The intention of the legislature was to punish any preparation, giving or administration of any substance known as a medicine, with intent to kill.—*Ib.*

34. The compelling the prosecutor to elect which count of the indictment on which he will proceed, is a matter in the discretion of the court, and a refusal to do so is no ground of reversal.—*Ib.*

35. In an indictment for a statutory offense it is sufficient to describe the offense in the words of the statute. But this rule can only apply in cases in which there is a sufficient description of the offense intended to be created by the legislature.—*Ib.*

36. In all cases of felony in which malice is the gist of the offense, malice must be averred in the indictment, otherwise it will be defective and the judgment arrested on motion. HANDY, J., *dissenting.*—*Ib.*

37. Where the issue on a plea in abatement is an immaterial one, and the plea is quashed by demurrer, the defendant should be allowed to plead over.—*Smith* v. *State*, 802.

38. In misdemeanors, where the issue on a plea in abatement is decided against the accused, he will not be allowed to plead over, but it is otherwise in cases of felony.—*Sumrall* v. *State*, 803.

39. The rule is clearly settled that it is incumbent on the prosecutor to prove on the trial every fact and circumstance stated in the indictment, material or necessary to constitute the offense charged; but those allegations in the indictment which are not necessary ingredients in the offense, may be rejected as surplusage and need not be proved.—*Dick* v. *State*, 842.

40. If an averment may be entirely omitted without affecting the charge against the prisoner, it may be considered as surplusage, and be disregarded in the evidence. This rule applies to averments which are not only unnecessary in themselves, but foreign to the charge; but it has not been held to apply to allegations which might have been properly dispensed with, but being inserted in the indictment, are descriptive of the identity of that which is legally essential to the charge.

41. The averment that the accused was a negro was wholly unnecessary, but having been made, it was descriptive of the person of the prisoner, and became a part of his identity, as much so as the name by which he was indicted.

42. A party indicted for murder may be convicted of any degree of manslaughter that the evidence warrants; but he cannot be convicted of manslaughter unless the indictment be found within one year next after the offense shall have been committed.—*Riggs* v. *State*, 846.

43. On change of *venue* in a criminal case, the clerk should send a transcript of the indictment and record to the court which is to try the cause, and not the original papers.—*Browning* v. *State*, 860.

44. This court will not review the action of a circuit court overruling a motion for a new trial, or giving instructions alleged to be erroneous, or any other matter assigned for error, unless the same shall have been properly excepted to in the court below.

45. An indictment under a statute must pursue the words of the statute, and aver all the facts and circumstances necessary to constitute the offense.—*Scott* v. *State*, 886.

46. If no objection be made in the court below to the examination of a witness, and if no motion be made to exclude his testimony from the jury, it will be too late to object to his competency in this court for the first time.—*Ned and Taylor* v. *State*, 1051.

47. The state may, in a criminal case, examine a witness whose name is not marked on the indictment, and who has never been summoned to testify.—*Ib.*

48. A verdict of guilty of manslaughter will not be set aside for an error in the court below in refusing to give instructions asked for by the prisoner, the object of which was to reduce the crime from murder to manslaughter.—*Ogle* v. *State*, 1069.

49. In indictments for misdemeanors, if a demurrer be sustained to the defendant's plea in abatement, the judgment is *respondeat ouster*.—*McGuire* v. *State*, 1097.

50. The verdict of the jury, in cases of felony, must be delivered in open court, and in the presence of the defendant. But if the defendant is absent from the court, as his own voluntary act, he cannot take advantage of his absence. His voluntary absence must be taken as a waiver of his right to be present. Hence, though the verdict is irregular in this respect, he cannot take the benefit of his own illegal act.—*Price* v. *State*, 1168.

51. In misdemeanors, a plea in abatement being found against the defendant, the judgment should be final, and not *respondeat ouster*.—*Mieure* v. *State*, 1205.

52. A verdict of guilty will be set aside if it appear that illegal evidence was admitted, which *might* have operated to the prejudice of accused; but *aliter*, when it is manifest that the illegal evidence could not have influenced the verdict.—*Lynes* v. *State*, 1208.

53. The overruling of a demurrer to the replication of the state, when the replication is afterwards withdrawn by the district attorney, is no ground of error.—*Rocco* v. *State*, 1280.

54. The withdrawal of a replication by the state, after a demurrer to it has been overruled, is no error.—*Ib.*

55. Where two are indicted for gaming, and one has plead guilty, and has been fined, he is a competent witness for the defense on the trial of his co-defendant, and it is not necessary to his competency that he has paid his fine.—*Strawhern et al.* v. *State*, 1338.

56. If an indictment against several persons charge them with the commission of several and distinct offenses, and not with the joint commission of the same offense, it seems that the defendants are competent witnesses for each other, before acquittal or conviction.—*Ib.*

57. It is settled by the courts, both in this country and England, that in point of law there is no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender.—*Ib.*

58. Where the indictment contains two counts, each charging a distinct offense, the defendant has no right to compel the prosecutor to elect upon which count he will proceed; it is a matter within the sound discretion of the court.—*Ib.*

59. If there be any doubt or uncertainty in the language employed by a jury in returning their verdict, the judge may make such inquiry of them as will enable him to ascertain their will and intention, and may order that the verdict thus ascertained be recorded.—*Gipson* v. *State*, 1345.

60. Where an accusation includes an offense of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious. Whart. Cr. L., § 384; Rev. Code, p. 622, art. 305, § 62. Under an indictment for an assault with intent to kill, the defendant may be convicted of a simple assault.—*Ib.*

61. When the verdict convicts the accused of an offense for which he could be properly tried under the indictment, the unnecessary addition of words descriptive of the offense in point of aggravation, will not vitiate it; and hence, under an indictment for an assault with intent to kill and murder, a verdict of guilty of an assault in the attempt to commit manslaughter will be good; for the verdict is a good finding as to the assault, and the descriptive words may be treated as surplusage.—*Ib.*

62. The order of the court admitting a party to bail on an indictment pending against

him, is not properly a part of the record in the matter of recognizance; and a defect in such order must be taken advantage of by plea, and not by demurrer to the *scire facias*.—*Fields* v. *State*, 1360.

63. The verdict of a jury on an indictment for murder, convicting a party of manslaughter, operates as an acquittal of every offense of a higher grade of which he might have been convicted under the indictment.—*Kohlheimer* v. *State*, 1388.

64. In point of law there can be no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender. And if the joinder of more than one distinct felony in the same indictment be objected to before plea, the court should quash the indictment. But this is a matter within the discretion of the court, and not necessarily a right of the accused. *Semble*, that such objection cannot be made after plea of not guilty.—*George* v. *State*, 1404.

65. In criminal cases the defendant cannot waive an arraignment, and he must plead in person to the indictment; he cannot plead by attorney; and where it is shown that the "defendant appeared by attorney and pleaded not guilty," the judgment will be arrested and the verdict set aside.—*Wilson* v. *State*, 1581.

66. Several persons indicted jointly may be tried separately, at the option of the state; and in an indictment against two or more, where the charges are joint as well as several, one may be convicted and another acquitted by the jury, and judgment rendered accordingly. But where several persons are jointly indicted and convicted, the sentence must be several, and the imposition of a joint fine would be erroneous.—*Gathings* v. *State*, 1688.

67. Forms of entries in records, which are found contained in all the books of authority on the subject, which are deeply seated in the foundations of the law, and which conduce to safety and certainty, ought not to be disregarded when the life or liberty of a human being is at stake. And it is error to pass sentence of death against a person convicted of murder by the verdict of a jury, without the court first asking the defendant if he has anything to offer why such sentence shall not be pronounced.—*James* v. *State*, 1741.

68. On such occasion the prisoner has a right to allege grounds for arrest of judgment, plead a pardon, address the court in his own mitigation, or cast himself on its mercy. This opportunity being denied, is sufficient ground for a reversal of the judgment.—*Ib.*

69. In criminal cases the record should show distinctly, leaving as little as possible to inference or presumption, all the proceedings in the several stages of the prosecution, trial, and sentence.—*Gaiter* v. *State*, 1752.

70. The record in a capital case being silent as to all the intermediate dates between the 9th and 24th of the month, at one term; and between the 14th of one month and 5th of the next, at another; and failing to show distinctly that the grand jury was organized; or that the grand jury presented the indictment; or that the prisoner was present in proper person at the trial; or that, after being found guilty of murder, was asked if he had anything to say why sentence of death should not be pronounced against him, is so defective as to vitiate a conviction and entitle the prisoner to a new trial.—*Ib.*

PRESUMPTIONS.

See *Evidence*, *Homicide*, *Record*, *Practice*.

1. In the absence of all proof of the facts or circumstances attending a homicide, the law presumes it to have been malicious, and therefore murder. But under such circumstances the law never presumes it to have been manslaughter. Such a presumption would be error.—*Hague* v. *State*, 1081.

2. The jury were instructed that "if the act producing death be such as is ordinarily attended with dangerous consequences, as by the use of a deadly weapon, or be committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation be shown; for the inference is that the natural or palpable effects of any acts deliberately done, were intended by the agent." *Held* to have been properly given.—*Mask* v. *State*, 1100.

3. In presumption of law, a person, in the absence of proof to the contrary, will be held to have intended the natural and probable consequences of every act deliberately done by him. But this presumption is only *prima facie* evidence of such intention. The jury should be left free to consider whether the testimony offered by the accused to rebut this legal presumption satisfies their minds of the absence of such intention.—*Jeff* v. *State*, 1253.

4. By the express terms of Rev. Code, 497, art. 126, a person who is an alien is disqualified to act as a juror in any case; yet if his disability was not made known to the court, and the defendant accepted him at the time, knowing the existence of such disability, it will be presumed that all objections were waived; and the juror having sat in the case will not vitiate the verdict.—*George* v. *State*, 1404.

5. The law presumes that a person intends to do not only what he accomplishes, but also the natural and probable consequences of every act done by him. But this presumption only amounts to *prima facie* and not to conclusive proof of such intention. The jury should be left free to consider whether the testimony offered by the accused to rebut this legal presumption, or otherwise submitted to them on the part of the state, satisfied their minds of the absence of such intention.—*Jeff* v. *State*, 1422.

6. In considering technical attempts to commit crime, the jury may take into consideration the nature of the act done, and the attendant circumstances, as matter of evidence to determine the particular intent with which it was performed; they may infer the specific intent to do a particular thing, which is the necessary or even probable consequence of the act proven to have been done.—*Ib.*

7. Proof of the use of a deadly weapon in an assault and battery by one person upon another is *prima facie* evidence of an intent to kill, which must prevail unless rebutted by other proof in the cause.—*Ib.*

8. The law presumes every person to be innocent until the contrary is proved. But when an *unlawful* act is proven, the presumption of innocence is rebutted, and the law presumes such *unlawful* act to have been *criminally intended*, unless the contrary is made to appear.—*Ib.*

PRINCIPAL AND ACCESSORY.

See *Accessory*, *Indictment*, *Practice*.

1. It is not necessary that a person to be guilty as principal, should perpetrate an offense with his own hands. If it be committed through the medium of an innocent agent, the employer though absent when the act is done, is answerable as principal; and if the agent be aware of the consequences of the act and answerable for it, he becomes a principal in the first degree, and the principal accessory before the fact.—*Williams* v. *State*, 422.

2. In all offenses below the degree of felony, there can be no accessories either before or after the fact. Those, who in felonies would be accessories before the fact, are, in offenses below that degree, principals, and must be proceeded against as such. This rule holds in regard to the highest and lowest of such offenses.—*Ib.*

3. If a party be present with the intention of giving assistance, if necessary, in the killing, he would be an aider and abettor, and a principal in the second degree, though his assistance might not be called into actual requisition. Presence and intention to aid in killing amount to participation.—*Ib.*

4. The rule is well settled at common law, that when in an indictment for murder a person is charged as principal, the jury cannot convict such person as accessory before the fact.—*Josephine* v. *State*, 1439.

5. Rev. Code, 44, art. 6, provides that no indictment pending before the adoption of the Code should be effected by its provisions not in force before its adoption. Therefore, art. 2, p. 572, of the Code, which provides that "every person who shall be an accessory to any murder or other felony before the fact, shall be deemed and considered a principal, and indicted and punished as such, and this whether the principal has been

previously convicted or not," does not apply to cases where the indictment was found before the adoption of the Code.—*Ib.*

6. In order to fix the guilt of a party charged as accessory after the fact, it is essential that the alleged felony should be complete. Until such felony has been consummated, any aid or assistance rendered to a party in order to enable him to avoid the consequences of his crime, will not make the person affording such assistance guilty as an accessory after the fact.—*Harrell* v. *State*, 1472.

7. The crime of murder is not complete until the death occurs.—*Ib.*

PROOF.

See *Evidence, Practice.*

1. On the trial of persons indicted for criminal offenses, the prosecution must prove the offense to have been committed in the county as charged in the indictment, to bring it within the jurisdiction of the court.—*Vaughn* v. *State*, 245.

2. Where the indictment charges a shooting with a felonious intent, it must be proved on the trial that the gun was so loaded as to be capable of doing the mischief alleged to be intended.—*Ib.*

3. It is not necessary that all the averments in an indictment should be proved as laid, in order to warrant a conviction. The general rule is that every material averment must be proved, yet it does not follow that it is necessary to prove the offense charged to the whole extent as laid. It is enough if so much of a charge be proved as constitutes an offense punishable at law.—*Swinney* v. *State*, 351.

4. The essential ingredient of the offense of selling liquor to a slave consists in the want of the permission of the master, and such want of permission must be proven to warrant a conviction.—*McGuire* v. *State*, 462.

5. The material allegations of the indictment, or those which charge the facts constituting the offense alleged, must in every case be sustained by sufficient proof.—*Ib.*

6. Where an evil intent is necessary to constitute an act a crime, it must be alleged in the indictment and proved in the same manner as any other material fact; and an allegation of shooting with intent to kill A. will not be sustained by proof of shooting with intent to kill B.—*Morman* v. *State*, 589.

7. Under the statute, approved March 9th, 1850, it is not necessary to allege in the indictment the name of the owner of any slave guilty of any crime punishable with death. But if the ownership is alleged, it must be proven on the trial.—*John* v. *State*, 606.

8. It is incumbent on the prosecutor to prove, on the trial, every fact and circumstance set out in the indictment which is material and necessary to constitute the offense charged. And every averment in the indictment not necessary to constitute the offense may be rejected as surplusage. But this rule does not apply to allegations, which, however unnecessary, are nevertheless descriptive of that which is material.—*Ib.*

9. As a general rule, every material averment in the indictment must be proved; but it is unnecessary to prove the offense to the whole extent charged. It is sufficient to prove so much of the indictment as to show that the accused has committed the offense charged.—*Murphy* v. *State*, 765.

10. The identity of the slave nor his ownership is in anywise an ingredient in the offense of trading with slaves. But being alleged, it is necessary that they should be satisfactorily proved.—*Ib.*

11. An indictment for betting on the result of an election of presidential electors in a certain state, is not sustained by proof of a bet on the result of the presidential election in that state.—*Gamble* v. *State*, 1096.

PUBLIC ROADS.

1. The commissioners of public roads are liable to a criminal prosecution for any neglect of duty.—*State* v. *Commissioners, &c.*, 29.

RAILROADS.

1. All laws and parts of laws enacted prior to the adoption of the Revised Code of 1857, and in conflict therewith, were, by articles 2 and 3, page 43, of the Code, repealed. Therefore, so much of the charter of the Mississippi Central Railroad Company as makes provisions for the punishment of persons placing obstructions on the track of the road, being a public law, and a matter of special provision in articles 163 and 164, p. 600, of the Revised Code, is superseded and repealed.—*McCarty* v. *State*, 1330.
2. An indictment that charges the accused with "wilfully and maliciously placing an obstruction on" a certain railroad named, "which obstruction was of such a nature to endanger the lives of persons being carried on said road," is sufficient under the Rev. Code, p. 600, art. 164.—*Ib.*

RAPE.

See *Evidence, Indictment.*

1. On the trial of a prisoner for a rape upon his ward, the entire record of his proceedings, as guardian, in the probate court, including his accounts and settlements and appropriations of the ward's property, is evidence to establish the continuing guardianship of the prisoner over the ward; and if the prisoner desire to exclude any portion of the record as irrelevant, he should move to exclude the irrelevant part, and not the whole record; in default of which the admission of the whole record will not be error, though the prisoner except to it at the time. Chief Justice SHARKEY *dissenting*, and holding that the whole record was inadmissible, as calculated to prejudice the jury against the prisoner, inasmuch as it showed that he had squandered the property of his ward, besides having despoiled her of her virginity.—*Towney* v. *State*, 305.
2. The prisoner was on trial for a rape, and a witness was asked if he had not at a certain time authorized his wife to offer the victim of the outrage a home, and in what manner he had authorized it; and the record, without setting forth the answer of the witness, stated in general terms that he answered the question in the affirmative, and stated the reasons which he had stated to his wife; it was held that, the record not disclosing what the testimony was which the witness gave, the court could not determine as to its legality. Chief Justice SHARKEY *dissenting*, and holding that, let the testimony be what it might, it was inadmissible, being a conversation between a man and his wife, not in the presence of the prisoner, and forming no part of the *res gestæ*.—*Ib.*
3. On the trial of a prisoner for a rape, if the victim of the outrage be a witness in the cause, it is competent for the prosecution to prove her good character, by way of confirming her credibility before the jury.—*Ib.*
4. A count in an indictment charging in the usual form an assault upon a woman, and attempt to ravish, is not bad for duplicity in charging that in said attempt, the accused did forcibly choke and throw down the woman. The latter allegation is only descriptive of the assault.—*Green* v. *State*, 574.
5. In an indictment against a slave for an attempt to commit a rape upon a free white woman, it is unnecessary to state that such slave is a negro or mulatto,—such an averment would be immaterial, and need not be made; but if made, it must be proved.—*Dick* v. *State*, 842.
6. The law of this state defining and punishing rape does not include rape committed by a slave upon a female slave, and an indictment against a slave for such offense is a nullity.—*George* v. *State*, 1249.

RECEIVING STOLEN GOODS.

See *Larceny.*

1. On a trial for receiving goods, knowing them to be stolen, it is error to charge the jury "that the discovery of the goods in the possession of the defendant (they having

been proved to be stolen), shortly after they were missed, and the denial by the defendant that he had any such goods in his possession, is presumptive evidence that he received them, knowing them to be stolen." It assumes as a fact proved, that the goods alleged to have been bought by the prisoner were stolen. It was in effect a charge upon the weight of testimony. Besides, the presumption arising from the facts would be that the accused had stolen the goods himself, and not that he had received them knowing they had been stolen.—*Sartorious* v. *State*, 624.

2. It was error to charge the jury that "if they believed from the evidence that the articles were purchased under their value, it is a presumption of the guilty knowledge of the defendant." The rule embraced in this instruction is too broad and comprehensive, and is indefensible upon reason or authority.—*Ib.*

3. The denial of a party, having in his possession stolen goods, that he has such goods in his possession, is presumptive proof of his guilty knowledge; but if it be shown that such denial of possession was the consequence of misunderstandings, such denial ceases to raise a presumption of guilt.—*Ib.*

RECOGNIZANCE.

See *Bail*, *Habeas Corpus*.

1. Judgment on the forfeiture of a recognizance for appearance will be reversed if there is a material variance between the recognizance, the *scire facias*, and the judgment of the court.—*Daingerfield* v. *State*, 156.

2. Where a bench warrant has been issued in term time, returnable to a subsequent day of the same term, the sheriff may take a recognizance for defendant's appearance at that day.—*Moss* v. *State*, 200.

3. Where the recognizance requires the party to appear at a certain day of the term, a forfeiture cannot be taken at a subsequent term without notice for that purpose. This rule would probably not apply to recognizances returnable generally at a particular term, if the forfeiture was taken during that term.—*Ib.*

4. The statute provides that recognizances shall continue from term to term, as other processes; and requires that recognizance shall contain a condition that the accused and his sureties shall be liable thereon, until the principal shall be discharged by due course of law. Still it seems that, if a forfeiture be not taken on the day for the appearance, it cannot be taken at a subsequent term without notice, and such notice should appear by the record.—*Ib.*

5. No particular form of words is required for the validity of a recognizance, provided it contains the essential requisites of such an instrument. A recognizance requiring the party to appear before "the judge" of the circuit court, etc., is sufficient. If it set forth sufficiently the cause for which it was taken, it need not describe specifically the circumstances of the offense.—*Dean* v. *State*, 220.

6. Where the principal in a recognizance was recognized to appear in the sum of fifteen hundred dollars, and his two sureties in the sum of seven hundred and fifty dollars each, it is error to render joint judgment against the sureties for fifteen hundred dollars; the judgment should have been against each for seven hundred and fifty dollars. A suggestion to the high court of errors and appeals, that the principal in the recognizance against whom the judgment was rendered in the court below, was dead before the judgment was rendered, cannot be inquired into by that tribunal.—*Ib.*

7. The mayor of the city of Vicksburg is authorized by the charter to take recognizances of persons to appear before the circuit court to answer for offenses with which they stand charged.—*Ib.*

8. Judgment was rendered on a recognizance made returnable to the 3d Monday after the 4th Monday in April, at a court held on the 3d Monday in March, the legislature having changed the time of holding the court from the former to the latter day, and directed all process to be returned to the latter; *held*, not to be error.—*McEwen* v. *State*, 282.

9. The sheriff acquires his authority to take recognizances of those whom he may arrest, on process from the circuit courts, from the statute, H. & H., 294, sec. 13, which invests him with discretion respecting the amount of security. The fact that the clerk, without the order of the court, directed the sheriff in the writ as to the number and amount of bail, is immaterial.—*Ib.*

10. Where a party was indicted in four different cases at the same term of the court, and recognizances given in each case, which were severally forfeited, and the clerk recites in the *scire facias* the forfeiture as having been taken *in these four cases* without specifying which cases, or their titles, or identifying them in any way; *held*, to be erroneous.—*Overaker* v. *State*, 268.

11. Where the sheriff returns a bench warrant, "executed," and says nothing of any recognizance or bail taken by him, the mere fact that a recognizance is recited in the record, there being nothing but its own recitals to connect it with the case, will not be sufficient to uphold a judgment for a forfeiture upon it.—*Ib.*

12. The judges of the courts of this state, by the constitution, by virtue of their offices, are conservators of the peace. And within the duties and powers of general conservators of the peace is included the power to commit all breakers of the peace, or to bind them in recognizance to keep it, or to answer for offenses committed against it.—*State* v. *Wofford*, 417.

13. All recognizances entered into by persons charged with a criminal offense, must be made returnable to the term of the circuit court next to occur by law after the time that the said recognizances are taken.—*Butler* v. *State*, 428.

14. A recognizance taken, conditioned for the appearance of the accused at a time when no court is held, is void.—*Ib.*

15. The recognizance being void, all the steps based upon it are also void, and it is competent for the court to vacate it at any time.—*Ib.*

16. A recognizance is an obligation of record entered into before a court or officer duly authorized for that purpose, with condition to do some act required by law.—*Pace* v. *State*, 637.

17. The sheriff is only authorized to take a recognizance from a person whom he may arrest on the process of a circuit court of law, charged before such court with any crime or misdemeanor, not punishable with death.—*Ib.*

18. The parties to a recognizance cannot, after the defendant's failure to appear, interpose objections to recognizance on account of the insufficiency of the grand jury. Objections to the grand jury must be made by the defendant by plea in abatement.—*State* v. *Borroum*, 638.

19. It is immaterial to the question of liability of the accused, arising from his failure to appear in court according to the tenor of his recognizance, that the issue upon the indictment is still pending. He is bound to appear according to the recognizance, in order to be regularly put on trial for the offense for which he was indicted.—*Ditto* v. *State*, 806.

20. A variance between the *scire facias* and the judgment *nisi* is a fatal defect, sufficient to quash the *scire facias*. So, also, is a variance between the recognizance and *scire facias* a good defense to the *scire facias*. But the defendant will not be entitled to it unless he sets it up by plea to the *scire facias*.—*Ib.*

21. If the defendant suffers judgment by default on the *scire facias*, he cannot on writ of error to that judgment bring to notice anything contained in the recognizance.—*Ib.*

22. The order of the court admitting a party to bail on an indictment pending against him, is not properly a part of the record in the matter of recognizance; and a defect in such order must be taken advantage of by plea, and not by demurrer to the *scire facias*.—*Fields* v. *State*, 1860.

23. A recognizance for the party charged with an offense is not void on account of a mistake in it in regard to the time of holding the court to which it is returnable. Rev. Code, 139, art. 201; ib., 620, art. 291; ib., 632, art. 368.—*Curry* v. *State*, 1862.

24. Where a master enters into a recognizance for the appearance of his slave to answer

an indictment for a felony, the subsequent emancipation of the slave discharges the master of the slave from the obligations of the recognizance.—*Lewis* v. *State*, 1581.

25. Where the surety in a recognizance or bail-bond, at the proper term of the court tenders his principal to the sheriff of the county, who receives him and imprisons him in a safe jail, from which he is released by irresistible force, it is a discharge of the surety.—*Ib.*

26. The responsibility of a surety on a bail-bond or recognizance ceases when he delivers the body of his principal to the sheriff of the proper county.—*Ib.*

27. A defendant to indictment being at large on bail, may, at any time, be surrendered by his bail to the sheriff of the county in which the indictment is pending; and the sheriff may again admit him to bail or recognizance with new sureties.—*Kellogg* v. *State*, 1619.

28. The conditions of a recognizance being that a defendant shall appear before the circuit court of the county, on the 4th Monday in May, that being the time fixed by law for the commencing of the court, and no year being specified, held sufficient to fix the liability of the surety in case of default at the next term of the court.—*Ib.*

RECORD.

See *Bill of Exceptions*, *Practice.*

1. The *venire* is no part of the record, and if an objection exists as to it, or to the panel of jurors summoned under it, the party, to avail himself of it, must place it upon the record by bill of exceptions.—*Byrd* v. *State*, 73.

2. It is the province of the caption of an indictment to show when the indictment was found, and before what court. And where the record states that "the grand jury was empanelled and sworn to inquire in and for the body of the county of Warren, viz., J. C., foreman," etc.; this is sufficient evidence that the grand jury was sworn, Castleman as foreman; and the swearing him as foreman was a sufficient appointment.—*Ib.*

3. It must appear by the record that the grand jurors were sworn; and if the record shows that one of them was "sworn as foreman," it will be sufficient evidence of *appointment* as such.—*Cody* v. *State*, 107.

4. The record, without any notice of the original *venire*, stated that fifteen persons, naming them, were drawn as a grand jury, and that A. E. D. (one of the number) was sworn as foreman of the same. There is no statement that he was appointed foreman by the court, nor that the remainder of the jurors took the oath required by law of grand jurors. *Held*, that the indictment was fatally defective.—*Ib.*

5. Where the record shows that the indictment was indorsed a true bill by one of the grand jurors, and that it was returned into court by the authority of the whole fifteen jurors who composed the panel, it is sufficient without the special appointment of a foreman.—*Friar* v. *State*, 114.

6. If the caption of the record fails to show in what county and at what place the court was holden, the record of the subsequent proceedings may be referred to and considered in connection with the caption, to remove the uncertainty. The whole record should be considered together, and that which is uncertain in one part may be rendered clear by that which is certain in another part.—*Loper* v. *State*, 120.

7. It should appear by the caption of the record, not only that the court was holden for the proper county, but that it was holden at the proper place within the county; and the omission of any material statement in the caption or record cannot be supplied by recitals in the indictment, which becomes no part of the record until it is returned into court in the manner prescribed by law.—*Carpenter* v. *State*, 126.

8. Where it appears from the whole record that the prosecution was in the name of the state, a formal statement in the indictment that it was found by the authority of the state, is not necessary.—*Greeson* v. *State*, 170.

9. Where it appeared by the record that a foreman was appointed, and that the indictment was returned, signed by him, and the caption stated that the grand jury

returned the bill into court by their foreman, it was held sufficient evidence that the bill was returned by the authority of the grand jury.—*Ib.*

10. A motion in arrest of judgment is confined to defects upon the face of the record itself, and which make the proceedings apparently erroneous; and no defect in evidence, or improper conduct on the trial, can be urged under this motion.—*Obey* v. *State*, 349.

11. It is the duty of the circuit court to charge the grand jury when empanelled, in regard to the nature of the duty which they are required to perform, and the motives which should govern them in the discharge of that duty. But the charge is not to be placed upon the record; nor can it be essentially necessary that the record should state that it was given at all, as the matter charged does not constitute ground of error. The charge must be presumed to have been given unless the contrary appears. —*McQuillen* v. *State*, 358.

12. A record is conclusive evidence, but what is or what is not a record, is matter of evidence, and may be proved like other facts.—*Rawles* v. *State*, 368.

13. Where the record states that the proceedings took place "in the circuit court of Harrison county, at a regular term thereof begun and held at the court-house of said county in Mississippi city, on the first Monday in March, 1848," it is sufficient.—*Seal* v. *State*, 473.

14. If the contrary does not fully appear from the record, it will be presumed that the grand jury who found the indictment was legally constituted.—*Ib.*

15. Charges given or withheld by the court, in criminal cases, are not necessarily a part of the record. Hence they will not be noticed by the appellate court unless they are embodied in a bill of exceptions. But papers which are not legitimately parts of the record, when transcribed into the record, and referred to by counsel, in his bill of exceptions, will be noticed when there is no doubt of their identity.—*Preston* v. *State*, 650.

16. Every fact incidental to the proceedings in the circuit court, not required by law to be incorporated in the record, must be presumed to have been properly done.—*Dyson* v. *State*, 710.

17. The record, in criminal cases, must show that the jury were sworn, but it need not set out the form of the oath prescribed to them by the court, McCarty v. State, 26 Miss., 299; and if the swearing of the jury is improper in any respect, it must be made a part of the record by bill of exceptions. But where the oath is set out and is incorrect the verdict will be set aside.—*Ib.*

18. Until the contrary appear, it will be presumed that the jury were sworn according to law.—*Ib.*

19. The statement in the record that the jury "were sworn the truth to speak in the issue joined," is sufficient to show that they were sworn according to law.—*Ib.*

20. Where the record of the trial of an indictment for murder shows that the grand jury returned into open court an indictment against the defendant for murder with no further description of the indictment, and immediately follows an indictment for murder and the arraignment and plea of defendant, the trial by a jury and other proceedings in the case, all bearing the same style of parties, the same designation of offense, the same number and the same circumstances of identity as the indictment, it is held that the record sufficiently identifies the indictment as that returned into court by the grand jury. A *venire facias* is no part of the record, unless made so by bill of exceptions.—*Green* v. *State*, 786.

21. Where the minutes of the court omit to state the character of the offense charged in the indictment, such omission forms no ground of error, if it be supplied by the other parts of the record. The rule is well settled that what is uncertain in any part of the record may be explained and rendered certain by reference to another part which is certain.—*Goodwyn* v. *State*, 287.

22. The record showed the following entry: "On the 3d day of April, 1844, the following entry was made on the minutes of the court, to wit: The grand jurors returned into court an indictment against William S. Goodwin, indorsed thereon a 'true bill;'

Wm. M. C. Mires, foreman of the grand jury, and returned to consider of further presentment. Said indictment is in the words and figures following, to wit: " *Held*, that these words show, with sufficient certainty, that an indictment was returned into court by the grand jury, and that the accused was indicted in due form.—*Ib.*

23. It must appear from the record that the court is held at the proper place within the county; and it is error for the court to sit at any other place; and a plea in abatement alleging these facts, when sustained, is sufficient to quash the indictment.—*Sass* v. *State*, 430.

24. The caption of the indictment stated that the court was held at Tallula, the prisoner plead that Tallula was not at that time the county seat: to which the state demurred: *held*, that the demurrer admitted that the court was not holden at the place designated by law, and that the indictment should, therefore, be quashed.—*Ib.*

25. A motion in arrest must be made on the grounds of defects appearing on the face of the record; the fact that the offense was committed twelve months before the finding of the indictment is no ground for such motion.—*Howard* v. *State*, 465.

26. In regard to matters which, by law, should appear in the record, no presumption can be indulged which would either contradict the record or supply a defect. Therefore the record must show that the indictment was regularly found and returned into court, according to law.—*Laura* v. *State*, 700.

27. Where the organization of the court at the term the trial took place is fully shown by the caption of the record, it is not necessary to show the caption of a previous one.—*McCarty* v. *State*, 705.

28. It is not necessary that the record should set out the oath prescribed to the jury.—*Ib.*

29. If the record show that an " officer was sworn to take charge of the jury," it is sufficient.—*Ib.*

30. The record is the only evidence of the organization of the grand jury, and whether the proper oath was administered or not, is never ground for a plea in abatement, and such plea should be disregarded by the court.—*Smith* v. *State*, 802.

31. The record must show that the indictment on which the prisoner was tried was found and returned into court by the grand jury.—*Jenkins* v. *State*, 810.

32. In change of venue in criminal cases, it must appear that the record transmitted to the court to which the venue is changed, is the record of the proceedings upon the indictment on which the prisoner was tried.

33. The record should show affirmatively that the grand jury who found the indictment was duly sworn. The formal statement in the indictment itself, that they were sworn, is insufficient.—*Foster* v. *State*, 885.

34. A special *venire* is no part of the record in a criminal case, and cannot be made so unless it is embodied in the bill of exceptions.—*Newcomb* v. *State*, 1303.

35. In criminal cases the record should show distinctly, leaving as little as possible to inference or presumption, all the proceedings in the several stages of the prosecution, trial, and sentence.—*Gaiter* v. *State*, 1752.

36. The record in a capital case being silent as to all the intermediate dates between the 9th and 24th of the month, at one term; and between the 14th of one month and 5th of the next, at another; and failing to show distinctly that the grand jury was organized; or that the grand jury presented the indictment; or that the prisoner was present in proper person at the trial; or that, after being found guilty of murder, was asked if he had anything to say why sentence of death should not be pronounced against him, is so defective as to vitiate a conviction and entitle the prisoner to a new trial.—*Ib.*

RETAILING.

1. A count in an indictment on the statute, charging that the defendant did unlawfully sell and retail vinous and spirituous liquors, to wit: wine, rum, gin, brandy and whisky, in a less quantity than one gallon, to persons to the jurors unknown; and that the said defendant did then and there suffer and permit the said vinous and spirituous liquors so retailed and sold in less quantities than one gallon, as aforesaid, to be

drank and used in and about the house of him, the said C., contrary to the form of the statute, etc., was held to be good.—*Kliffield* v. *State*, 150; *Noe* v. *State*, 153.

2. A count charging that the defendant, as a tavern and inn-keeper, did unlawfully, gratuitously, and without special charge therefor, offer, give, and deliver vinous and spirituous liquors, etc., in less quantity than one gallon, to divers persons to the jurors unknown; which said persons were then and there the guests of the said C., contrary to the statute, etc., was held to be good.—*Ib.*

3. A count charging that the defendant, inn-keeper, etc., did then and there, by evasion, etc., violate the plain intent and meaning of an act, etc., is too vague and uncertain, and will not warrant a conviction. When the indictment contains several counts, and one of them is good, it will sustain the verdict of "guilty."—*Ib.*

4. The act of 1839, which declares that "it shall not be lawful for any person to sell or retail any vinous or spirituous liquors in less quantities than one gallon, nor suffer the same, or any part thereof, to be drank or used in or about his or her house," creates two distinct offenses; and hence an indictment which charges the defendant with "selling or retailing less than one gallon," and "permitting the same to be used in and about his or her house," is bad for duplicity.—*Miller* v. *State*, 186.

5. Where the indictment contains some good counts and some bad, and the verdict of the jury is general, the verdict will be sustained, upon the presumption that it was found under the good count.—*Ib.*

6. The act of 1842, entitled "An act to regulate the mode of obtaining license, etc., and to amend an act entitled An act for the suppression of tippling houses, etc.; approved February 9th, 1839," is constitutional.—*Noonan* v. *State*, 212.

7. On the trial of a person for the violation of this statute, it is not necessary to prove the particular kind of spirituous liquors by name; nor is it necessary to the proof of a person being a slave, to prove his master's name.—*Ib.*

8. A party indicted under the statute for retailing spirituous liquors in less quantity than one gallon, may be punished by imprisonment as well as fine; therefore it is not error to issue a *capias* for his arrest, that being the proper process in such cases.—*McEwin* v. *State*, 232.

9. On the trial of a man, under the statute against selling liquor to slaves without permission of the master, it appears that some persons, who suspected the defendant of a violation of the statute, sent a negro belonging to one of them, with money and a jug, and told him to get some whisky, and the defendant sold him the whisky; whereupon the court instructed the jury, "that permission to the slave to buy liquor of any one, did not satisfy the statute, which required permission to the seller." This instruction was erroneous, as a permission to buy implied a permission to the vendor to sell; the fact should have been left to the jury to say, whether the master gave the slave permission to buy, or whether the slave was sent to ascertain and fix the fact that the vendor would sell without permission, and did so sell. If the jury believe the former, they should find for the defendant; if the latter, they should find against him.—*Jolly* v. *State*, 329.

10. The delivery of money to a slave by his master, with instructions to buy whisky with it from a person whom he suspects of having sold whisky in violation of the statute to his slaves, for the purpose of detecting the offender, if guilty, does not excuse the sale of whisky to the slave for money; it is not such permission to the slave as was contemplated by the statute.

11. Under the statute of 1842, amendatory of the statute of 1839, "for the suppression of tippling houses," etc., sec. 2, appropriating all the money accruing from the granting of licenses to retail, and from fines for violations of the statute committed within the city of Vicksburg, to that city, the particular place where the offense was alleged to have been committed became a fact and circumstance constituting the offense, and is necessary to be established by proof, as stated in the indictment.—*Ligori* v. *State*, 382.

12. The law gives to the city of Vicksburg all the fines and license money for retailing vinous and spirituous liquors within the corporate limits. And, therefore, an indict-

ment charging a sale within the county of Warren, is not supported by proof of a sale on a wharf-boat in the city of Vicksburg.—*Botts* v. *State*, 689.

13. On trial of an indictment for illegal traffic in ardent spirits, the excuse being a sale "for medical purposes," the declarations of the vendee made at the time of the sale, are not sufficient to establish that the liquor was for medical purposes.—*Haynie* v. *State*, 943.

14. The time charged in an indictment for unlawful retailing, is not essential to or descriptive of the offense, and is therefore immaterial except under plea of limitation.—*Massa* v. *State*, 1205.

15. Upon a purchase of one gallon of spirituous liquors, a less quantity only of which is delivered at the time, the residue remaining in the possession of the vendor, and not separated from the bulk in the barrel from which the part delivered was taken, it is in law a sale of only the part delivered; and where these circumstances are proven, the intent of the vendor is immaterial.—*Thomas* v. *State*, 1276.

16. It is not incumbent on the state, in an indictment for retailing without license, to show that the defendant had no license; if the defendant relies on that fact for his defense, he must prove it.—*Ib.*

17. In prosecutions for retailing, a druggist selling spirituous liquor in the quantities and within the limits prohibited by the statute, cannot justify himself by the mere representations of the purchaser, that the liquor was for medicinal purposes.—*McGuire* v. *State*, 1291.

18. As a general rule, a partner is not liable for the criminal acts of his associate, done without his knowledge or consent; but by the express provision of the Rev. Code, 199, art. 9, this rule is changed in relation to sales of vinous and spirituous liquors by licensed retailers to an intoxicated person; and under that article, one partner may be indicted and convicted for a sale of such liquor to an intoxicated person by his associate, though he was not present.—*Whitton et al.* v. *State*, 1299.

19. It is not necessary to a conviction under an indictment for a violation of the statute prohibiting the sale of vinous and spirituous liquors to a person intoxicated at the time of the sale, that the seller should actually believe that the purchaser was intoxicated; it is sufficient if it be shown that the buyer was actually intoxicated, and that the seller had good reason to believe that he was in that condition.—*Ib.*

20. After the expiration or repeal of a law, no penalty can be enforced nor punishment inflicted for violations of it committed while it was in force, unless some special provision be made for that purpose by statute, and penalties incurred under such repealed or expired statute must be collected before, and cannot be collected after the repeal or expiration of it.—*Teague* v. *State*, 1364.

21. T. was indicted for selling liquors in violation of a statute which prohibited the sale of vinous and spirituous liquors within a certain locality, in any quantity whatever; he entered into recognizance for his appearance, which he forfeited, and judgment *nisi* was entered against him and his sureties. The act under which he was indicted was then repealed, but the repealing act provided that "it should not be so construed as to release or discharge from punishment any one who had violated the act intended to be repealed, by selling vinous and spirituous liquors in less quantities than one gallon." *Held*, That this last act must be construed so as to save a prosecution under the first act, although the indictment did not charge the sale in less quantities than a gallon, and that on a trial of that indictment after the date of the repealing act, the state would be held to prove that the sale was in less quantities than a gallon; and, therefore, that the judgment *nisi* should be final.—*Ib.*

22. It is not necessary to the justification of a druggist selling spirituous liquor in less quantities than five gallons, within five miles of the University of Mississippi, that he should make and file an affidavit with the probate clerk, as required by the Rev. Code, 198, art. 8, before making the sale. A compliance with the act of February, 1860, ch. 284, is a justification.—*Henwood* v. *State*, 1258.

23. By the amendment of the charter of the city of Holly Springs, passed November 19th, 1857, the mayor and aldermen have the exclusive right to grant license to retail

vinous and spirituous liquors within the corporate limits. This power must be exercised in accordance with the requirements of the Rev. Code, 197-8, art. 4; and a grant of license without the petition of a majority of the legal voters resident within the city, is null and void.—*House* v. *State*, 1536.

24. Under the act of the legislature of November the 4th, 1865, the corporate authorities of all cities and towns in this state have the exclusive right to grant or refuse license to retail vinous and spirituous liquors within their corporate limits. Upon license so granted, the boards of police of the county may order and fix the amount of taxes to be assessed and collected.—*Licke* v. *State*, 1546.

25. The proprietor of a drug store is liable for the acts of his agents or clerks in the unlawful sale of intoxicating drinks, even though such sales be without his knowledge and against his express orders.—*Riley* v. *State*, 1632.

26. In an indictment against a druggist for illicit sale of intoxicating liquors, it is not necessary to allege the name of the person to whom sold.—*Ib.*

27. On the trial of an indictment for illicit traffic in vinous or spirituous liquors, proof of an agreement to sell is not sufficient; there must be proof of an actual delivery of the liquors. There need not be proof of payment, because a sale on credit is as much a violation of law as a sale for cash.——*Ib.*

28. Several persons indicted jointly may be tried separately, at the option of the state; and in an indictment against two or more, where the charges are joint as well as several, one may be convicted and another acquitted by the jury, and judgment rendered accordingly. But where several persons are jointly indicted and convicted, the sentence must be several, and the imposition of a joint fine would be erroneous.—*Gathings* v. *State*, 1688.

29. The 9th art. of the Rev. Code, p. 199, is held to introduce a new rule of evidence in the trial of those indicted for violation of its provisions; and where partners are jointly indicted under that article, they may be convicted and punished, although one of them may have been wholly ignorant of the commission of the illegal act; each being responsible for the illegal act of his copartner, whether he participated in it or not.—*Ib.*

30. There is no partnership in crime, and hence it is not necessary to allege in the indictment that several committed the offense as partners. So, under this statute, it is immaterial whether the liquor was sold by the defendant or by his servant or partner, with or without his knowledge or assent; having an interest in the liquor sold, he is indictable whether he assented to or knew of the sale or not.—*Ib.*

31. The general rule stated in several cases (5 How., 242; 13 S. & M., 263; 23 Miss., 521), that "indictments on statutes must state all the circumstances which constitute the definition of the offense in the act, that they must pursue the precise technical language employed in the statute defining the offense," is a little too broad and general. Rev. Code, 573, art. 7, supplies a rule of absolute force. "Merely formal and technical words shall not be deemed necessary (in indictments), so the offense be certainly and substantially described therein." And the indictment would be good although the "precise technical language of the statute" be omitted; provided the offense is "certainly and substantially" described in other words of equivalent import. —*Kline* v. *State*, 1695.

32. Where the enacting clause of the statute describes the offense with certain exceptions, it is necessary to state all the circumstances that constitute the offense, and to negative the exceptions; but if the exceptions are contained in separate clauses of the statute, they may be omitted in the indictment, and the defendant must show that his case comes within them, to avail himself of their benefit.—*Ib.*

33. The indictment omitted to negative the exception by inserting the words, "not being a druggist or apothecary," as contained in the enacting clause of the statute. This negation being material, the statute does not authorize the court, at a subsequent term, to allow an amendment by inserting the words of the exception.—*Ib.*

SCIRE FACIAS.

See *Recognizance.*

1. Judgment on the forfeiture of a recognizance for appearance, will be reversed if there is a material variance between the recognizance, the *scire facias*, and the judgment of the court.—*Daingerfield* v. *State*, 156.
2. A judgment upon a *scire facias* which does not recite the original judgment correctly, is erroneous.—*Bridges* v. *State*, 592.
3. Where the *scire facias* is demurred to on account of a variance between it and the judgment *nisi*, the demurrer should be sustained and the defendants discharged.—*State* v. *Borroum*, 638.
4. A variance between the *scire facias* and the judgment *nisi* is a fatal defect, sufficient to quash the *scire facias*. So, also, is a variance between the recognizance and *scire facias* a good defense to the *scire facias*. But the defendant will not be entitled to it unless he sets it up by plea to the *scire facias*.—*Ditto* v. *State*, 806.
5. If the defendant suffers judgment by default, on the *scire facias*, he cannot on writ of error to that judgment bring to notice anything contained in the recognizance.—*Ib.*
6. A judgment *nisi* is not final until rendered so by judgment upon the *scire facias*, and it is competent in determining upon the latter judgment, to consider whether the *scire facias* is supported by the judgment *nisi*, which it is merely process to complete and render final.—*Douthit* v. *State*, 809.
7. If the judgment *nisi* and the *scire facias* are insufficient to sustain the final judgment, it will be erroneous and must be reversed, though no objections were made in the court below.—*Ib.*
8. A variance between the judgment *nisi* and the *scire facias*, is fatal to the *scire facias* and the final judgment.—*Ib.*

SENTENCE.

See *Judgment, Verdict.*

1. W. was convicted of murder in the circuit court, but owing to some cause not appearing of record, sentence was not executed. At a subsequent term of the court, certain proceedings were had in the case. *Held*, that errors in the subsequent proceedings cannot affect the validity of the judgment previously entered against the prisoner.—*Woodsides* v. *State*, 95.
2. Where a prisoner has been found guilty on a charge of larceny, and the court below pronounced an illegal sentence, the appellate court will reverse the sentence, and pronounce judgment in conformity to the statute.—*Oliver* v. *State*, 157.
3. Upon conviction of manslaughter, the prisoner must be present in court when sentence is pronounced; without such presence, the sentence would be invalid.
4. The sentence of the court, inflicting the punishment of imprisonment, must fix the date of its commencement, or otherwise it will be erroneous.—*Kelly and Little* v. *State*, 235.
5. Where the verdict of the jury, finding the accused guilty of manslaughter, is regular and valid, but the sentence of the court is erroneous, the judgment of the court may be reversed without disturbing the verdict, and the cause remanded with directions to the court below to pronounce a correct judgment.—*Ib.*
6. An indictment is defective in substance, when the court cannot pronounce the proper sentence of the law upon a verdict finding the accused guilty.—*Hurt* v. *State*, 645.
7. When the circuit court pronounces a wrong sentence on a prisoner found guilty by a jury, on writ of error the judgment will be reversed, and prisoner released.—*Wharton* v. *State*, 1257.
8. Forms of entries in records, which are found contained in all the books of authority on the subject, which are deeply seated in the foundations of the law, and which conduce to safety and certainty, ought not to be disregarded when the life or liberty of a human being is at stake. And it is error to pass sentence of death against a person convicted of murder by the verdict of a jury, without the court first asking the de-

fendant if he has anything to offer why such sentence shall not be pronounced.—*James* v. *State*, 1741.

9. On such occasion the prisoner has a right to allege grounds for arrest of judgment, plead a pardon, address the court in his own mitigation, or cast himself on its mercy. This opportunity being denied, is sufficient ground for a reversal of the judgment. 1 Bishop's Cr. Pr., § 865, cited and approved.—*Ib.*

SERVICE AND RETURN.

1. A return of "served a true copy of the indictment, *venire facias*, and the *venire* on the prisoner," is a sufficient service of the panel.—*Shaffer* v. *State*, 65.

2. The *venire facias* directed the sheriff to summon fifty jurors, but the panel contained the names of fifty-one. The sheriff returned that he had served the prisoner with a true copy of the indictment and a list of the jurors; but the name of one had been erased from the panel, leaving the fifty still. The affidavit of the prisoner, affirming the identity of the list, and denying that a true one had been delivered to him, cannot be received by the court as conclusive that he had not been regularly notified of the jurors who were to pass upon his trial. If the sheriff has returned that he has delivered to the prisoner a correct copy of the indictment, and a list of the jury, the truth of such return cannot be collaterally questioned.—*Woodsides* v. *State*, 95.

3. Where the sheriff executes a bench warrant, and takes bail, he should so state it, and return the facts in full to the court.—*Overaker* v. *State*, 268.

4. Where the sheriff returns a bench warrant, "executed," and says nothing of any recognizance or bail taken by him, the mere fact that a recognizance is recited in the record, there being nothing but its own recitals to connect it with the case, will not be sufficient to uphold a judgment for a forfeiture upon it.—*Ib.*

SHERIFF.

See *Service and Return*, *Officer*.

1. The sheriff, as one of the officers of the court, is competent to serve the prisoner with a copy of the indictment and the *venire*.—*Friar* v. *State*, 114.

2. Judgment *nisi* against a sheriff for failing to return a bench warrant is void if entered without notice.—*Jenkins* v. *State*, 1068.

3. Art. 120, p. 123, of Rev. Code, which provides that "if any sheriff or his deputy, coroner, or other officer, shall make a false return on any process, such sheriff, deputy," &c., "shall, for every such offense, be liable to pay the sum of five hundred dollars," &c., to be recovered on motion; and notice given to "such sheriff, deputy," &c., creates a penal offense against the officer committing the act, and renders him individually liable for it; and the sheriff and his sureties are not liable on motion, under that article, for a false return made by his deputy, but the deputy himself is responsible.—*State* v. *Nichols*, 1358.

4. The state of Mississippi is as properly a plaintiff in a prosecution or suit instituted in her name as a private individual, and hence is entitled to all the remedies provided by law for plaintiffs against sheriffs or other officers for misconduct in the execution and return of process.—*Ib.*

SPEEDY TRIAL.

See *Trial*.

1. By the words "speedy trial," as used in the constitution of this state, in guarantying to every one indicted a special trial by an impartial jury, is meant a trial regulated and conducted by fixed rules of law; and any delay created by the operation of those rules, is not within the meaning of the constitutional provision.—*Nixon* v. *State*, 226.

STATE WARRANTS.

1. The statute of this state (How. & Hutch., 270), provides that "it shall be the duty of the auditor of public accounts to examine, settle, and audit all accounts, claims, or demands whatsoever, against the state, arising under any act or resolution of the legislature, and to grant to every claimant authorized to receive the same a warrant on the state treasury." These warrants are not "bills of credit" within the meaning of the constitution of the United States, although they may have been sometimes used by individual holders as a circulating medium and a substitute for paper money. *Vide* note, *supra*.
2. Whether an instrument is or is not a "bill of credit," depends upon the intention of the legislature, in the act authorizing its issue; but that intention can only be ascertained by reference to the act itself. Testimony *aliunde* to explain the motives, or to point out the object of the law-makers, is inadmissible.

SUPREME COURT.

See *Record, Practice.*

1. The high court of errors and appeals will not take cognizance of points not presented in the court below; and the rule applies with greater force where the point is one of fact, and was raised and abandoned.—*Dyson* v. *State*, 710.

STATUTES.

See *Indictment, Practice.*

1. The act of 1839 guards against the effect of repealing the act of 1822, but expressly providing that it shall not affect any case subject to punishment under the act of 1822, or any former law.—*Oliver* v. *State*, 157.
2. The criminal court for the counties of Warren, Claiborne, Jefferson, Adams, and Wilkinson, established by the act of 1836, was a court of inferior and limited jurisdiction under the constitution, and one which the legislature was clearly empowered to establish by the 24th section of the 4th article of the constitution.—*Thomas* v. *State*, 160.
3. The statute which gives the accused the right to have a "copy of the indictment and a list of the jurors" at least two entire days before his trial, intends thereby two entire judicial days. In computing, therefore, the two days, the fraction of the day of its service must be excluded.—*Nixon* v. *State*, 226.
4. It is a general rule that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it. They must also pursue the precise and technical language employed in the statute in the description of the offense.—*Anthony* v. *State*, 467.
5. The laws against gaming will not need a strict construction, for the reason that they are remedial and not penal; hence, reasonable certainty is all that the law requires in regard to this offense.—*Seal* v. *State*, 473.
6. When, after an offense has been committed, an act of the legislature changes the punishment, the accused, on conviction, has the option to select the punishment prescribed by the new or old law.—*Clarke* v. *State*, 530.
7. In a proceeding by the state upon the official bond of a defaulting public officer, a general statute of limitations or the neglect or delay of the public officers in commencing proceedings, is no defense.—*Joiner* v. *State*, 573.
8. A disabling statute does not apply to a state unless made applicable by its express terms.—*Ib.*
9. Indictments upon statutes, particularly of a highly penal character, must state all the circumstances which constitute the definition of the offense, in the act. They must

also be clear and certain to every intent, and pursue the precise and technical language employed in the statute in the description of the offense.—*Ike* v. *State*, 578.

10. All laws and parts of laws enacted prior to the adoption of the Revised Code of 1857, and in conflict therewith, were, by articles 2 and 3, page 43, of the Code, repealed. Therefore, so much of the charter of the Mississippi Central Railroad Company as makes provisions for the punishment of persons placing obstructions on the track of the road, being a public law, and a matter of special provision in articles 163 and 164, p. 600, of the Revised Code, is superseded and repealed.—*McCarty* v. *State*, 1330.
11. Statutes are not considered repealed by implication, unless the repugnancy between the provisions of the new and former statute be plain and irreconcilable.—*House* v. *State*, 1536.
12. Statutes relating to the same subject-matter must be considered together, and must be so construed as to give force and effect to all, if they be not conflicting.—*Ib.*
13. In order to derive a power by implication, it must appear that the power thus sought to be implied is so necessary to the enjoyment of some specially-granted right, that without it that right must fail.—*Ib.*
14. By the amendment of the charter of the city of Holly Springs, passed November 19th, 1857, the mayor and aldermen have the exclusive right to grant license to retail vinous and spirituous liquors within the corporate limits. This power must be exercised in accordance with the requirements of the Rev. Code, 197-8, art. 4; and a grant of license without the petition of a majority of the legal voters resident within the city, is null and void.—*Ib.*

TIME AND PLACE.

See *Evidence*, *Indictment*, *Venue*.

1. The time of the commission of the offense laid in the indictment is not material, and it does not confine the proof within the limits of that period; the indictment will be satisfied by proof of the offense at any anterior day.—*Oliver* v. *State*, 157.
2. It is not necessary, as a general rule, to prove the offense to have been committed on the very day named in the indictment. But whenever time is of the essence of the offense, or a necessary part of the description of it, the time must be proved as laid.—*Miller* v. *State*, 1042.
3. Time is not essential or descriptive of the offense of betting on an election.—*Ib.*

TRIAL.

See *Practice*, *Record*, *Speedy Trial*.

1. If the accused pleads not guilty, and proceed to trial, he waives the privilege given him by statute of having a copy of the indictment and *venire* two days before the trial.—*State* v. *Johnston*, 32.
2. The statute which gives the accused the right to have a "copy of the indictment and a list of the jurors" at least two entire days before his trial, intends thereby two entire judicial days. In computing, therefore, the two days, the fraction of the day of its service must be excluded.—*Nixon* v. *State*, 226.
3. Where a prisoner, indicted for murder, cannot, by the rules of law, be put upon his trial until the last judicial day of the then term of the court has partially elapsed, it will not be an infraction of the constitution entitling him to a speedy trial, for the court, upon the application of the state, to postpone the trial to the next term.—*Ib.*
4. In cases of homicide it must appear affirmatively that the accused was present at the trial, or it will be error. The presence of the prisoner cannot be inferred.—*Scaggs* v. *State*, 384.
5. Where the organization of the court at the term the trial took place is fully shown by the caption of the record, it is not necessary to show the caption of a previous one.—*McCarty* v. *State*, 705.

VENIRE FACIAS.

1. By the statute, the panel of jurors is to be drawn in term time, or in vacation, and a *venire* is directed to be issued, returnable to the next term. The grand jury is to be drawn from the number appearing; the balance are to be sworn as petit jurors for the term. These jurors were not intended exclusively to form the panel for the trial of criminal cases.—*Shaffer* v. *State*, 65.

2. The *venire* may be for a greater number of jurors than twelve, and may be made returnable the same day it is issued, or any day during the term.—*Ib.*

3. A command to the sheriff, embraced in the special *venire*, to summon the jury "residing as near as may be to the place where the murder was committed," is erroneous, and ground for a reversal of the judgment.—*Ib.*

4. The *venire* is no part of the record, and if an objection exists as to it, or to the panel of jurors summoned under it, the party, to avail himself of it, must place it upon the record by bill of exceptions.—*Byrd* v. *State*, 73.

5. The *venire facias* in capital cases, is not a writ within the contemplation of the 20th section of the circuit court law, and is not required to bear test on the first day of the term next preceding that to which the same may be made returnable. The authority to issue this writ and to fix the day on which it shall be returned, vested in the circuit courts, not by virtue of the above statute, but as incident to their powers as courts of oyer and terminer at common law. The act of 1833, prescribing the mode of summoning and empanelling juries in capital cases, was simply declaratory of the powers which those courts before possessed; and did not, in any respect, modify their authority as it then existed.—*Woodside* v. *State*, 95.

6. Challenge to the array is an irregular form of pleading, whereby the party excepts to all the jurors returned upon the *venire*, for some original defect in making the return thereto; and must relate to the acts of the sheriff, and should charge a particular default or partiality in forming the array. Consequently, the want of legal qualification in a juror, placed upon the panel, is no ground of challenge to the array.—*Ib.*

7. The *venire facias* directed the sheriff to summon fifty jurors, but the panel contained the names of fifty-one. The sheriff returned that he had served the prisoner with a true copy of the indictment and a list of the jurors; but the name of one had been erased from the panel, leaving the fifty still. The affidavit of the prisoner, affirming the identity of the list, and denying that a true one had been delivered to him, cannot be received by the court as conclusive that he had not been regularly notified of the jurors who were to pass upon his trial. If the sheriff has returned that he has delivered to the prisoner a correct copy of the indictment, and a list of the jury, the truth of such return cannot be collaterally questioned.—*Ib.*

8. Since the passage of the act of 1836, to amend the jury laws, no challenge to the array shall be sustained, nor shall any *venire facias* be quashed by any court of justice in this state, for any cause whatsoever, except for corruption in the officer who may summon the jury.—*Thomas* v. *State*, 160.

9. Motions by the state, in the absence of the accused, to quash the *venire facias* and for the issuance of an alias *venire facias*, made after arraignment and before trial, and which were overruled, will not vitiate the verdict of the jury. The absence of the accused may have been the reason for overruling the motions.—*Kelly and Little* v. *State*, 235.

10. Except in capital cases, the court has no authority to entertain a challenge to the array of the *venire facias*; or award a special *venire*, only when there is none of the regular *venire* in attendance on the court; and an indictment found by a grand jury selected from the special *venire* is void.—*Baker* v. *State*, 523.

11. The *venire* does not necessarily constitute a part of the record, unless placed there by being embodied in the bill of exceptions.—*Organ* v. *State*, 684.

12. It is not competent for the prisoner to question the sufficiency of the *venire* on error, when he has raised no objections to it in the court below, by motion or plea in abatement, but has pleaded in bar and been convicted.—*Ib.*

13. The name of the same juror appearing twice on the *venire*, without any collusion or improper design, and without any injury shown to have been done the prisoner by it, is no ground of error.—*McCarty* v. *State*, 705.

14. The regular *venire* is a matter of record, accessible to the accused, and he is not entitled to a copy of it. But by the statute, he is entitled to a copy of the special *venire*.—*Ib.*

15. The return of the sheriff upon a special *venire*, "executed by summoning seventy-five men, as within, to pass as jurors in the case of The State v. H. Weeks," accompanied by a list of the men, is sufficient; it need not be stated in the return that the jurors are good and lawful men of the county.—*Weeks* v. *State*, 903.

16. A mistake in the copy of the special *venire*, by which the Christian name of a juror is slightly changed by mistake or inadvertence, is not error, especially when no objections are made before the trial.—*Browning* v. *State*, 991.

17. It is no ground to quash a special *venire* in a criminal case, that one of the persons named in it was not a citizen of the United States; that would have been good cause of personal challenge, or of challenge to the fact, but it is not a defect in the writ.—*Durrah* v. *State*, 1668.

18. The cause for which a special *venire* may be quashed, must be either some fraudulent misconduct of the officer, or some manifest error in selecting, drawing, and summoning, in violation of law.—*Ib.*

19. That a copy of the *venire* had not been served on the prisoner or his counsel a sufficient time before trial, would be no ground to quash the writ, although it might be ground for postponing the trial until he should have such time; and if he does not object for such a reason, but goes into trial, he will be taken to have waived the objection.—*Ib.*

VENUE.

See *Evidence*, *Indictment*, *Time and Place*.

1. Where the *venue* is changed, it is not the duty of the clerk to send any but the original papers in the case; and a writ of error to the circuit court of the county in which the trial was had, will not reach an error in the proceedings of the court of the county from which the *venue* has been changed. *Quære:* Can a writ of error be issued to the circuit court of such county?—*Byrd* v. *State*, 73.

2. In Missouri, in a change of *venue* in a criminal cause, the original indictment must be retained in the office of the clerk in the county in which it is found. A copy only should be included in the transcript of the record and proceedings.—*Ib.*

3. If the caption of the record fails to show in what county and at what place the court was holden, the record of the subsequent proceedings may be referred to, and considered in connection with the caption, to remove the uncertainty. The whole record should be considered together, and that which is uncertain in one part may be rendered clear by that which is certain in another part.—*Loper* v. *State*, 120.

4. Where the accused submits his affidavit, fortified by that of another, setting forth grounds, and praying for a change of *venue*, and the court makes the order changing the *venue* accordingly, he will not be subsequently heard to criticise the regularity of his own proceedings. The court had full jurisdiction to make the order, and this court will not presume against its regularity.—*Ib.*

5. The *venue* was changed from Lafayette county to Marshall; the transcript of the record of the circuit court, certified and transmitted with the papers by the clerk, were found to be imperfect; there is no doubt that the circuit court of Marshall county had authority to award a *certiorari* to the clerk of Lafayette circuit court to forward an amended record.—*Ib.*

6. On the trial of persons indicted for criminal offenses, the prosecution must prove the offense to have been committed in the county as charged in the indictment, to bring it within the jurisdiction of the court.—*Vaughan* v. *State*, 245.

7. The proof of the *venue* must be established to warrant a conviction; but, like other facts, it may be proved by circumstances. Where, therefore, from all the circum-

stances established in the case, the jury found that the *venue* was correctly laid, it is sufficient, and their verdict cannot be set aside on that account.—*Coon* v. *State*, 455.

8. In cases of homicide, where the wound is inflicted in one county and the death takes place in another, the indictment must be preferred in the latter, or it will be void.—*Stoughton* v. *State*, 460.

9. A conviction without proof of the *venue* is void.—*Green* v. *State*, 574.

10. Where the accused has been indicted, tried, convicted and sentenced in one county, and upon a reversal of the judgment has obtained a change of venue to another county, and is put upon his trial there, it is error to allow the affidavit upon which the venue has been changed, or the record of the former trial and conviction, to be read in evidence to the jury.—*Boles* v. *State*, 593.

11. Under the statute of 1822, Hutch. Code, 814, where a person receives a wound in one county and dies in another county, the indictment should be preferred in the county where the death occurs; and it must be proven that deceased did die in the county where the indictment is found.—*Turner* v. *State*, 785.

12. In change of venue in criminal cases, it must appear that the record transmitted to the court to which the venue is changed, is the record of the proceedings upon the indictment on which the prisoner was tried.—*Jenkins* v. *State*, 810.

13. The statements of a physician who examined the wounds of the deceased immediately after they were inflicted, although not an eye-witness of the affray—that the wounds were given in the proper county—and the description of, and reference (by other witnesses) to various localities at and near the scene of killing, which were probably familiar to the jury, are sufficient proof of the venue, particularly when no objection is raised on this account at the trial.—*Riggs* v. *State*, 846.

14. On change of *venue* in a criminal case, the clerk should send a transcript of the indictment and record to the court which is to try the cause, and not the original papers.—*Browning* v. *State*, 860.

15. In a criminal case, the accused has no right to demand that a change of venue be granted upon his mere *ex-parte* showing, made in accordance with the statute; the court has the right to examine other witnesses as to the grounds upon which the application is based, and if, upon such examination, the court is satisfied that the accused can have a fair and impartial trial in the county where he was indicted, it is not only his right but his duty to refuse the application.—*Weeks* v. *State*, 903.

16. On application in a capital case for a change of venue on account of alleged public excitement and prejudice, it is competent for the state to examine witnesses to disprove the existence of such excitement and prejudice; and in such case the defendant has a right to cross-examine the state witnesses.—*Mask* v. *State*, 948.

17. The circuit court, into which a criminal case has been removed by change of venue, must try the defendant upon a certified copy of the indictment, and not upon the original.—*Browning* v. *State*, 991.

18. Under the act of 1856, exception to the sufficiency of the proof of venue must be taken at the trial in the court below, or the point will not be available here.—*Hamilton* v. *State*, 1089.

VERDICT.

See *Evidence, Instructions Jury, New Trial.*

1. Where the jury assess a fine, the court will not grant a new trial unless the amount of the fine be so excessive as to evince partiality or corruption in the jury.—*State* v. *Blennerhassett*, 1.

2. Where, by the assent of the accused and the state, entered on the record, the jury were allowed by the court to bring in a sealed verdict and deposit it with the clerk, and to separate until a certain day; and they did so, and appeared on the day named, when their verdict was opened by the clerk and read to them, and they "severally, upon their oaths in open court, confirm their sealed verdict," and say, "We, the jury, find the prisoner guilty in manner and form as he stands charged in the bill of indictment," the conviction was held to be regular and valid. And where the judge directs

the jury to bring in a sealed verdict, and gives them permission to separate after agreeing on the same, the parties will be deemed to have assented to such permission, if no objection appear, and it is no cause of objection to the verdict.—*Friar* v. *State*, 114.

3. Where the statute creates several degrees of the same offense, and graduates the punishment according to the degrees, the verdict must designate the degree, or else no judgment can be pronounced.—*Thomas* v. *State*, 160.

4. Motions by the state, in the absence of the accuser, to quash the *venire facias* and for the issuance of an alias *venire facias*, made after arraignment and before trial, and which were overruled, will not vitiate the verdict of the jury. The absence of the accused may have been the reason for overruling the motions.—*Kelly and Little* v. *State*, 235.

5. Where the verdict of the jury, finding the accused guilty of manslaughter, is regular and valid, but the sentence of the court is erroneous, the judgment of the court may be reversed without disturbing the verdict, and the cause remanded with directions to the court below to pronounce a correct judgment.—*Ib.*

6. Where an accusation includes an offense of inferior degree, the jury may acquit of the higher crime, and convict the defendant of a degree less atrocious.—*Swinney* v. *State*, 351.

7. Where an indictment contains four counts, and the jury find the accused guilty as to the three last, the verdict is sufficient to warrant a judgment. Swinney v. State, *supra*, 376, cited and approved.—*Morris* v. *State*, 387.

8. The evidence and the verdict must both be confined to the charge in the indictment, otherwise the administration of the law becomes uncertain, and the prisoner is deprived of the protection which a knowledge of the precise charge is calculated to throw around him.—*Anthony* v. *State*, 467.

9. Under the statute, Hutch. Code, 988, § 22, upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the offense charged, but guilty of an inferior degree of such offense, and such a conviction will be a bar to another indictment for the same offense.—*Brantley* v. *State*, 484.

10. In prosecution for misdemeanors, where there is a general verdict of guilty, and there is any good count in the indictment, it will be referred to that and supported.—*Wash* v. *State*, 517.

11. The same indictment against the same individual may contain counts for several felonies of the same degree, and it is no ground for either demurrer or motion in arrest of judgment; hence, if several felonies of the same degree be included in the same indictment, and there be a general verdict, judgment may be given on any or all the counts, according as they may be supported by the evidence.—*Ib.*

12. A charge in an indictment of an assault with intent to kill and murder, is negatived by a verdict of an assault with intent to commit manslaughter, and the verdict is an acquittal of the prisoner of the offense charged in the indictment, and a bar to further prosecution for the same offense.—*Morman* v. *State*, 589.

13. The 33d and the 36th sections of the 3d article of the Penitentiary Code, Hutch. Code, 960, 961, 965, have created separate and distinct classes of offenses; and under an indictment for an assault with intent to kill and murder, a conviction for an assault with intent to commit manslaughter cannot be sustained.—*Ib.*

14. Nor will such conviction be aided by the 29d section, article 8th, of said Code, that section relating only to that class of offenses which the statute makes to consist of different degrees; and where a conviction of a degree inferior to that charged in the indictment will be sustained.—*Ib.*

15. The verdict of a jury, on the trial for murder, finding a person guilty of manslaughter, operates as an acquittal of the charge of murder, and will be a bar to a second prosecution for the same offense.—*Hurt* v. *State*, 645.

16. The verdict of the jury, in case of felony, must be delivered in open court, and in the presence of the defendant. But if the defendant is absent from the court, as his own voluntary act, he cannot take advantage of his absence. His voluntary absence

must be taken as a waiver of his right to be present. Hence, though the verdict is irregular in this respect, he cannot take the benefit of his own illegal act.—*Price* v. *State*, 1168.

17. If there be any doubt or uncertainty in the language employed by a jury in returning their verdict, the judge may make such inquiry of them as will enable him to ascertain their will and intention, and may order that the verdict thus ascertained be recorded.—*Gipson* v. *State*, 1345.

18. Where an accusation includes an offense of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious. Whart. Cr. L., § 384. Rev. Code, p. 622, art. 305, § 62. Under an indictment for an assault with intent to kill, the defendant may be convicted of a simple assault.—*Ib.*

19. When the verdict convicts the accused of an offense for which he could be properly tried under the indictment, the unnecessary addition of words descriptive of the offense in point of aggravation, will not vitiate it; and hence, under an indictment for an assault with intent to kill and murder, a verdict of guilty of an assault in the attempt to commit manslaughter will be good; for the verdict is a good finding as to the assault, and the descriptive words may be treated as surplusage.—*Ib.*

20. The verdict of a jury on an indictment for murder, convicting a party of manslaughter, operates as an acquittal of every offense of a higher grade of which he might have been convicted under the indictment.—*Kohlheimer* v. *State*, 1388.

21. When counts for grand larceny, and for receiving stolen goods, are joined in the same indictment, and the jury return a verdict of guilty generally, and assess the value of the property at such a sum as reduces the offense under the first counts to petit larceny, the court cannot properly render a judgment on such verdict.—*Jenkins* v. *State*, 1526.

WITNESS.

See *Evidence*, *New Trial*, *Practice*.

1. A prosecutor in an indictment is a competent witness for the state upon the trial, though liable for costs if the prosecution be frivolous or malicious.—*State* v. *Blennerhassett*, 1.

2. Where two defendants are tried together on indictments for the same assault and battery, one of the defendants is not a good witness for the other upon the trial, unless no proof of guilt is offered against the defendant proposed as a witness.—*Ib.*

3. The voluntary withdrawal during the trial of a witness subpœnaed, but not examined, on behalf of the state, is not sufficient ground to grant a new trial, especially where his testimony is not shown to be material to the defense.—*Ib.*

4. For the trial of a slave on an indictment for murder, his owner was a competent witness for him.—*Isham* v. *State*, 195.

5. On the examination in chief, it is irregular and improper to propound a question which assumes a fact to be proved which is not proved;—whether such a question is or is not a leading question, *quære*.—*Toumey* v. *State*, 805.

6. It is a well-established general rule, that leading questions should not be propounded to a witness on the examination in chief; but there are exceptions to this general rule; as where the witness is manifestly reluctant and hostile to the interest of the party calling him; or where he has exhausted his memory without having stated the particular required, as a proper name or other fact, which cannot be arrived at by a general inquiry; or where the witness is a child of tender years, whose attention cannot be otherwise called to the subject-matter.—*Ib.*

7. The circuit court before which the examination is had, is allowed to exercise a certain discretion in permitting leading questions to be propounded to a witness on the examination in chief; that discretion, however, is not an absolute or arbitrary one, but is subject to revision in the appellate court; and if it appear that leading questions were propounded under circumstances that did not justify them, and that the party against whom they operated excepted to them at the time, this court will reverse the judgment, and grant the injured party a new trial. Mr. Justice CLAYTON *dissenting* as to the

power of the appellate court to revise the discretion exercised by the court below in permitting the leading questions.—*Ib.*

8. This discretion of the court to permit leading questions on the examination in chief, is allowed to be exercised alone in the cases forming exceptions to the general rule, and where these do not exist, the discretion is not allowed; as where the witness is a willing witness, of competent age, or favorable to the party calling him; in these cases, to allow leading questions will be a fatal error.—*Ib.*

9. On the trial of the prisoner for a rape, the victim of the outrage being a witness for the state, testified that the crime had been committed about seven months before indictment found, which, as far as appeared by the record, was the first disclosure by the witness of the commission of the crime; it also appeared that the prisoner had been the guardian of the witness from early orphanage, and was her step-father; and that she was, at the time of the alleged offense, sixteen years of age;—she was then asked, "Did the prisoner then, or at any subsequent time, say anything to you in relation to this matter to dissuade you from disclosing it? State when, where, and what he said." This was held to be a leading and illegal question. Mr. Justice CLAYTON, *dissenting*, held the question to be legal and proper.—*Ib.*

10. Under the same circumstances, the following question, propounded to the same witness, was held to be leading and improper, viz.: "Did the prisoner, at any time subsequent to the transaction, say anything to you about what punishment the laws of Mississippi would inflict on you or him, or both? State it all." Mr. Justice CLAYTON *dissenting.*—*Ib.*

11. Under the same circumstances, the question to the same witness, "If the risoner, in any of his antecedent conversations, offered property or any other advancement to you, in order to attach you to him, say so;" was held to be illegal and inadmissible. Mr. Justice CLAYTON *dissenting.*—*Ib.*

12. On the trial of a prisoner for a rape, if the victim of the outrage be a witness in the cause, it is competent for the prosecution to prove her good character, by way of confirming her credibility before the jury.—*Ib.*

13. No offense except perjury and subornation of perjury will disqualify or render a person incompetent to be sworn and testify as a witness in any cause; but such conviction may, in all cases, be given in evidence to impeach the credibility of the person so testifying. That he was an accomplice, does not render him incompetent as a witness against his principal.—*Keithler* v. *State*, 408.

14. An examination before the magistrate on trial of *habeas corpus* cannot be read for the purpose of discrediting a witness, unless it be read over to and signed or approved by the witness at the time it was made.—*Nelms* v. *State*, 509.

15. The misconduct of a witness for the state in answering an illegal question, put by the state, after it had been objected to by the accused, when the answer is promptly ruled out by the court, is no ground for a new trial; unless it were distinctly shown that the answer thus made had a sinister influence on the verdict of the jury.—*Sartorius* v. *State*, 624.

16. Witnesses who have been ordered by the court to withdraw from the court-room during the examination of witnesses, but who still continued present and heard the examination, will not ordinarily be examined. But it rests in the sound discretion of the judge whether they shall be examined or not. The safest rule seems to be not to reject such evidence altogether, but to admit it, subject to such remarks as the circumstances may warrant.—*Ib.*

17. The party examining a witness in chief should interrogate him as to all material matters in the first instance; if he omits a material question it cannot be put on examination in reply. New questions unconnected with the subject of the cross-examination, or which do not tend to explain it, cannot be put in reply. Such is the general rule, but it rests in the sound discretion of the court to determine whether the facts of a particular case do or do not warrant a departure from it. This court will interfere with the exercise of this discretion only in cases where the injury arising from a departure from the rule is manifest and great.—*Ib.*

18. As a general rule, in civil as well as criminal cases, a person who is interested in the event of a suit or prosecution, is incompetent as a witness. But where the statute gives a reward for the conviction of offenders, or the witness as informer is entitled to a part of the fine imposed by statute on the accused; on the grounds of public policy, and for the purpose of bringing offenders to justice, such interested person is a competent witness in behalf of the prosecution. FISHER, J., *dissenting*.—*Murphy* v. *State*, 765.

19. Where a witness is impeached only by one other witness, and such impeaching witness is afterwards contradicted by another witness, it is the peculiar province of the jury to judge which of them are entitled to credit.—*Riggs* v. *State*, 846.

20. The credibility of witnesses swearing to a juror's prejudgement of the issue was to be determined entirely by the court to whom the application for a new trial was addressed. The court was to consider the characters and positions of the juror and witnesses respectively, and the manner and circumstances of the juror's statements on his *voir dire*, and from these evidences to determine; and a determination thus made should stand. Per HANDY, J., *dissenting*.—*Sam* v. *State*, 893.

21. In the examination of witnesses it is the general rule that the cross-examination, like the examination in chief, may be co-extensive with the issue, and not confined to matters brought out by the examination in chief.—*Mask* v. *State*, 948.

22. The weight and number of authorities sanction the rule that a party has no right to cross-examine a witness except as to facts and circumstances connected with matters stated in his direct examination, unless it be to open the way to impeach his credit.—*Ib.*

23. If no objection be made in the court below to the examination of a witness, and if no motion be made to exclude his testimony from the jury, it will be too late to object to his competency in this court for the first time.

24. The principal witness against the accused, and whose testimony was necessary to their conviction, was a slave. The accused were also slaves, and were charged with the murder of another slave; all belonging to the same master. The witness, on the second day after the killing, was charged by his master with a knowledge of it; which he denied. He was afterwards tied, and stricken one blow by his master; and he and the other slaves were, at the same time, informed by the master that he intended to ascertain who did the killing, and that whoever was guilty should be hung. The witness thereupon stated that he was an eye-witness to the killing, and that the accused committed the deed, and that they had threatened to kill him if he ever divulged it; and he also, at the same time, gave a minute account of the transaction. Four months thereafter he was examined on the trial, making, in substance, the same statement. He was corroborated, in some respects, by other witnesses; and he differed from some others as to the time of the day at which certain facts, having a material connection with the question of the guilt or innocence of the accused, transpired. *Held:* That he was a competent witness, and that his credibility was a matter peculiarly in the province of the jury, and that their verdict convicting the accused of the homicide, as well warranted by his testimony.—*Ned and Taylor* v. *State*, 1051.

25. The state may, in a criminal case, examine a witness whose name is not marked on the indictment, and who has never been summoned to testify.—*Ib.*

26. In questions respecting the character of witnesses, the doctrine respecting *ante litem* and *post litem motam* is in no way applicable.—*Mask* v. *State*, 1100.

27. Under the Rev. Code, 614, art. 252, a grand juror who found the bill of indictment is a competent witness for the state, on the trial of it.—*Rocco* v. *State*, 1280.

28. If a witness answer in the affirmative a question whether he has not made statements or done acts in relation to the matter involved in the issue, going to show a strong feeling or bias on his part, touching the main fact which gave rise to the trial, and in justification or condemnation of the party on trial, that fact would be proper to be weighed by the jury in considering the weight to be given to his testimony.—*Newcomb* v. *State*, 1303.

29. It is competent to contradict the testimony of a witness, who, upon his examination,

has denied that he had used expressions or done acts, in relation to the matter involved in the issue, showing that he is under a bias or undue influence against the opposite party involved in the transaction which forms the subject-matter of the issue.—*Ib.*

30. Anything legitimately tending to show that a witness is under undue influence or bias for or against a party to an issue in which he testifies, may be shown to a jury, to enable them to graduate the true value of his testimony; as, the near relation of the witness to the accused.—*Ib.*

31. A party introducing a witness has no right to object to the propounding of a question to the witness, the answer to which might tend to criminate him. It is in the power of the witness to object, and if he does not object, the question and answer, if not otherwise objectionable, are competent.—*Ib.*

32. If a witness declines to answer a question on the ground that the answer might criminate him, no inference prejudicial to his credit can be drawn from his refusal, and courts should be careful so to inform the jury.—*Ib.*

33. The jury are the judges of the evidence. Therefore it is no ground of reversal that the jury did not give credit to certain witnesses.—*Ib.*

34. Where two are indicted for gaming, and one has plead guilty, and has been fined, he is a competent witness for the defense on the trial of his co-defendant, and it is not necessary to his competency that he has paid his fine.—*Strawhern et al.* v. *State*, 1338.

35. Where there is a conflict in the testimony of two witnesses, it is within the province of the jury to decide which of them is entitled to credit.—*George* v. *State*, 1404.

36. As a general rule, a witness is not permitted to express his opinion upon a particular question, whether such question arise upon a fact stated, or a combination of facts admitted or proved; yet an exception to this rule extends to persons of skill on questions of skill, science, or trade. But this exception extends only to experts, and not to persons who are not shown to be experts in whatever scientific question that may be propounded to him.—*Caleb* v. *State*, 1490.

37. To discredit a witness, it is competent to prove that he had made discordant statements at other times and places; but to re-establish his credibility, or to support what he has deposed on the trial, it is inadmissible to prove that he has made the same statements to third persons.—*Head* v. *State*, 1700.

38. It is competent for the defendant to put to the state's witnesses the interrogatory "What is your avocation?" and the state has no right to interpose objections to the answer; the witness may decline to answer where it would tend to criminate him or her, or bring them into disgrace or reproach; but this is the privilege of the witness, and of which it is the duty of the court to advise him.—*Ib.*

WRIT OF ERROR.

1. Where the *venue* is changed, it is not the duty of the clerk to send any but the original papers in the case; and a writ of error to the circuit court of the county in which the trial was had, will not reach an error in the proceedings of the court of the county from which the *venue* has been changed. *Quære:* Can a writ of error be issued to the circuit court of such county?—*Byrd* v. *State*, 73.

2. Power of clerk to grant writ of error in criminal cases.—*Rockhold* v. *State*, 188.

3. Clerks of the circuit court cannot grant writs of error in criminal cases; the writ in such cases can only issue upon the flat of a judge, or court of competent jurisdiction.—*Ib.*

4. In criminal prosecutions, after the verdict of a jury, and a judgment of acquittal, neither a new trial nor a writ of error can be granted to the state.—*Anderson* v. *State*, 247.

5. A writ of error cannot be entertained in the appellate court unless there has been a judgment in the court below.—*Lyftin* v. *State*, 420.

6. A writ of error will not lie where there has been no judgment pronounced by the court below, not even where a judgment of imprisonment has been pronounced, and no term of imprisonment has been fixed.—*Wharton* v. *State*, 1527.

7. On a writ of error, where no judgment has been pronounced, the prisoner will be remanded to the court below for the proper judgment.—*Ib.*

8. When the circuit court pronounces a wrong sentence on a prisoner found guilty by a jury, on writ of error the judgment will be reversed, and prisoner released.—*Ib.*

INDEX TO APPENDIX.

ABATEMENT. PAGE

Pleas of (See *Grand Jury, Pleading*).

ABDUCTION.

General form of indictment for 1772

ABORTION.

General form of indictment for (three counts) 1773

Form of indictment for an assault on a woman with quick child, so that the child was brought forth dead 1774

Form of indictment for administering a potion with intent to produce abortion 1775

ACCESSORY.

Form of indictment against accessory before the fact, together with the principal 1760

Same, the principal being convicted 1760

Form of indictment against accessory after the fact, together with the principal 1761

Same, the principal being convicted 1761

ADDITION.

Form of plea, that defendant has none 1813

Plea of wrong 1814

ADULTERY AND FORNICATION.

Form of indictment against both parties jointly, for 1802

By a married man with a married woman, form of indictment for 1802

Form of indictment against the man for 1802

Same, against the woman 1803

Form of indictment against an uncle and niece for an incestuous marriage ... 1803

ADJOURNMENT.

Of court on account of the failure of the judge to attend, form of entry on the minutes respecting 1842

AFFRAY.

Form of indictment for 1797

ARRAIGNMENT.

Form of entry on minutes respecting 1831

ARREST OF JUDGMENT.

Form of motion for 1847

Form of entry on minutes respecting 1847

Form of judgment on, and entry 1847

ARSON.

General form of indictment for 1779

Form of indictment for burning one's own house, with intent to defraud insurers 1779

ASSAULT. PAGE
Form of indictment for simple 1775
Same, without battery 1775
Form of indictment for threatening in a menacing manner 1776
By encouraging a dog to bite, form of indictment for 1776
And tearing out prosecutor's hair, form of indictment for 1776
With intent to kill and murder, form of indictment for 1777
With felonious intent generally, form of indictment for 1777

ASSEMBLY.
Unlawful, form of indictment for 1797

ATTEMPTS TO COMMIT OFFENSES.
General form of indictment for 1811
Form of indictment for administering poison, with intent to murder 1812

AUTREFOIS ACQUIT.
Form of plea of 1817
Same, another form 1819
Replication to plea of 1819

AUTREFOIS CONVICT.
Form of plea of 1821
Form of replication to plea of 1823
Rejoinder 1823

BASTARDY.
See *Adultery*.

BETTING.
See *Gaming*, *Elections*.

BIGAMY.
General form of indictment for 1801

BILL OF EXCEPTIONS.
Form of entry respecting 1837

BOND.
For writ of error, form of 1839
Form of entry in record respecting 1839

BRIBERY.
Form of indictment for endeavoring to bribe a constable 1804
Form of indictment against a judge for accepting a bribe 1805
Form of indictment for corrupt influence in an election (first count), offering a bribe 1805
Same. (Second count), actually giving a bribe 1805
Form of indictment for an attempt to influence a voter by threatening to discharge him from employment 1808

BURGLARY.
General form of indictment, with larceny 1778
Same, without larceny 1778
Form of indictment for breaking out of a house 1778
Form of indictment for attempting to commit 1779

CAPIAS.
Form of, and entry in record respecting 1843

CAPTION.
Form of, in making up minutes and final record 1820

CERTIFICATE.
Form of certificate of clerk to transcript of record 1841

CHEATS. PAGE
Form of indictment for selling by false weights and measures.....
(See *Obtaining Goods by False Pretences.*)
COHABITATION.
Form of indictment for unlawful..... 1794
(See *Adultery and Fornication.*)
COMPOUNDING FELONY.
General form of indictment for..... 1799
CONDUCTOR OF RAILROADS.
CONSPIRACY.
Form of indictment for..... 1789
Same. (First count), unexecuted conspiracy..... 1789
Same. (Second count), overt act..... 1789
To rob. Form of indictment for..... 1789
To murder. Form of indictment for, with an attempt to induce a third party to take part..... 1790
CONTINUANCE.
Entry on minutes respecting..... 1847
DEAD BODIES.
Form of indictment for disinterring..... 1795
DISORDERLY HOUSES.
Form of indictment for keeping..... 1792
DISTURBING ELECTIONS.
Form of indictment for..... 1798
DISTURBING RELIGIOUS WORSHIP.
Form of indictment for..... 1798
DOING BUSINESS ON THE SABBATH.
Form of indictment for..... 1793
DRUNKENNESS.
Form of indictment for..... 1794
DUELLING.
Form of indictment for sending a challenge..... 1810
Same. (First count), for sending a letter containing the challenge..... 1810
Same. (Second count), for delivering a written challenge..... 1810
Form of indictment for accepting a challenge..... 1811
Form of indictment against a second in a duel..... 1811
ELECTIONS.
Form of indictment for disturbing..... 1798
Form of indictment for an attempt to influence a voter by threatening to discharge him from employment..... 1808
Form of indictment for illegal voting..... 1808
Form of indictment for betting on result..... 1809
(See *Bribery.*)
EMBEZZLEMENT.
General form of indictment for..... 1781
Same. (Second count), with larceny..... 1782
ENTRIES.
Forms of, for the assistance of clerks in making up minutes and final records in criminal cases..... 1830
FORGERY.
General form of indictment for..... 1777

FORNICATION. PAGE
Form of indictment for living in a state of fornication and adultery..... 1808
(See *Adultery*.)

GAMING.
General form of indictment for..... 1792
Form of indictment against an inn-keeper for permitting gambling in his house..... 1792
Form of indictment for betting on an election..... 1809
Form of indictment for betting on a horse-race..... 1809
Form of indictment for winning money at cards..... 1809

GRAND JURY.
Form of plea, that six of the grand jurors by whom the bill of indictment was found, were not duly qualified..... 1826
Form of entry on minutes respecting organization of..... 1830
Presentation of indictment by, and form of entry respecting..... 1831
Form of entry on minutes in case of the failure of the board of supervisors to select..... 1842

HOMICIDE.
See *Murder*.

HOUSE OF ILL-FAME.
Form of indictment for keeping..... 1792
(See *Nuisance*.)

ILL-FAME.
Houses of (See *Nuisance*).

INDICTMENT.
General forms of.....1759, 1812
General frame of..... 1759
Conclusion of common law offense..... 1759
Conclusion of statutory offense..... 1759
Presentation of by grand jury, and form of entry respecting..... 1831
Same. Form of entry in final record.....1844-5
Form of motion to quash, and entry respecting..... 1845
Same. Judgment on and form of entry..... 1846
Form and manner of entering demurrer to..... 1846
Same. Judgment, and form of entry (several forms)..... 1846
Abatement of, and form of entry respecting..... 1846
Same. Judgment and form of entry..... 1847

INSTRUCTIONS.
Mode and form of entry in the final record..... 1836

JEOPARDY.
Form of plea of former..... 1824

JUDGES.
Exchange of, on circuit; form of entry on minutes..... 1842
Failure of, to attend; how entered..... 1842

JURISDICTION.
Plea to the, form..... 1814
Same. Replication..... 1814

JURY.
Form of entry of the selection and empanelling..... 1832
(See *Venire Facias*.)

LARCENY.
General form of indictment for..... 1780
Form of indictment for stealing a bank note..... 1781
(See *Receiving Stolen Goods*.)

LIBEL.
General form of indictment for..... 1799
Form of indictment for libel on an individual, generally..... 1800
Same (second and third counts), for posting a man as a scoundrel..... 1801

LICENSE LAWS.
Forms of indictments for violating..... 1795
(See *Retailing. Spirituous Liquors.*)

LOTTERIES.
Form of indictment for selling tickets of..... 1796

MAINTENANCE.
General form of indictment for..... 1804

MALICIOUS MISCHIEF.
Form of indictment for maliciously wounding a cow..... 1782
Form of indictment for cutting down trees..... 1782
Form of indictment for killing a steer..... 1782

MAYHEM.
Form of indictment for, by slitting a nose, and against the aider and abettor.. 1771
Same. Second form..... 1772
Same. Biting off an ear..... 1772
Form of indictment for maliciously breaking an arm with intent to maim.... 1772

MISNOMER.
Form of plea of..... 1813
Form of replication to plea of..... 1813

MISTRIAL.
Form of entry of..... 1850

MURDER.
General form of indictment for, under the statute..... 1761
Form of indictment for, by shooting with a pistol..... 1762
Form of indictment against the principal in the first and principal in the second degree for shooting with a pistol..... 1762
By poisoning, form of indictment..... 1764
Same. (First count), with arsenic in chicken soup..... 1764
Same. (Second count), against one defendant as principal in the first, and the other as principal in the second degree..... 1765
Same. (Third count), against one as principal and the other as accessory before the fact..... 1766
By giving the deceased poison, thereby aiding her in committing suicide; form of indictment..... 1768
By stabbing with a knife; form of indictment for..... 1768
In a duel fought outside of the state; form of indictment for..... 1769

NEW TRIAL.
Entries on minutes respecting..... 1833

NOLLE PROSEQUI.
Form of entry of order of..... 1849

NOT GUILTY.
Form of plea of, in cases of treason or felony..... 1812
Same. In misdemeanors, etc., where the defendant may plead by attorney .. 1812
Same. Form of entry of..... 1831

NUISANCE.
General form of indictment for..... 1790
Form of indictment for profane swearing in a public street..... 1791
Form of indictment for keeping gaming house..... 1791
Form of indictment for keeping disorderly house..... 1792

OBTAINING GOODS (OR MONEY) BY FALSE PRETENSES. PAGE
General frame of indictment for..... 1783
Form of indictment for falsely personating another, and thereby obtaining goods or money..... 1784
Form of indictment for obtaining money by check on a bank where the defendant had no effects..... 1784
Form of indictment for obtaining money under the pretense that defendant was the agent of A. B., and as such had been sent by A. B. to C. D. to receive certain money due from the latter to the former..... 1785
Form of indictment for obtaining goods from a tradesman under the pretense that defendant was a servant of a particular customer, and was sent for the particular goods named..... 1786

OVERSEER OF ROADS.
Form of indictment against, for neglecting to repair his road..... 1794

PERJURY.
General form of indictment for..... 1787
Form of indictment for falsely swearing to an alibi for a felon..... 1787

PLEADING.
General forms of, in criminal cases..... 1812

PLEAS.
Form of special, generally..... 1815
Same. Form of replications to..... 1815
Same. Form of rejoinder..... 1815

PROFANE SWEARING.
(See *Nuisance.*)

RAPE.
General form of indictment for..... 1769
Form of indictment for carnally knowing and abusing a woman child under the age of ten years..... 1770
Form of indictment for abusing a female child with her consent..... 1770

RECEIVING STOLEN GOODS.
General form of indictment for..... 1781

RECOGNIZANCE.
Form of, and form of entry respecting..... 1850
Form of entry of default of..... 1851
Form of judgment *nisi* on forfeiture..... 1851
Form of *scire facias*..... 1852

RECORD.
Form of caption of..... 1834
Forms of entries in..... 1834
(See *Entries.*)

RELIGIOUS WORSHIP.
Form of indictment for disturbing..... 1796

REMANDMENT.
Of prisoner after verdict; form of entry respecting..... 1833

RESCUE.
Form of plea to indictment for, that the goods which the defendant was charged with rescuing from the sheriff, who had seized them under an execution against a third party, were, in fact, at the time the property of and in the possession of the defendant..... 1827

RESISTING AN OFFICER.
Form of indictment for..... 1798

RESPONDEAT OUSTER.
Form of judgment..... 1847

RETAILING.
Form of indictment for first retailing of intoxicating liquors 2376

RETURN.
Of sheriff on Venire Facias 2385

RIOT.
General form of indictment for 2376
See ante.

ROADS.
Form of indictment against overseer for neglecting to repair 2374

ROBBERY.
General form of indictment for 2372
Form of indictment for attempt to extort money by threatening to accuse another of a crime 2372

SABBATH.
Form of indictment for violating 2373

SCIRE FACIAS.
Form of, and entries respecting 2388

SENTENCE.
Form of, and entry respecting 2388

SIMILITER.
Form of, generally 2383

SODOMY.
General form of indictment for 2370

SPECIAL PLEAS.
See *Plea, Pleading.*

SPECIAL VERDICT.
See *Verdict, Special.*

SPIRITUOUS LIQUORS.
Form of indictment for retailing 1795

SUPERSEDEAS.
Form of petition for, and entry in record respecting 1588
Form of writ of 1589

TRANSCRIPT.
Form of certificate of clerk to 1580
(See *Record.*)

TRIAL.
Form of entry respecting 1583

UNLAWFUL ASSEMBLY.
Form of indictment for 1797

VENIRE FACIAS.
Form of, and entries respecting 1581
Form of entry of service of copy of, on the defendant 1581
Form of entry of, in final record 1585

VENUE.
Judgment on, and entries respecting 1849

VERDICT.
Form of entry of, on minutes 1583

WRIT OF ERROR.
Form of, and entry in record 1587
Form of petition for 1578
Form of return of clerk on 1589

WRIT OF ERROR BOND.
Form of, and entry respecting 1589

Stanford Law Library
3 6105 063 583 095